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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1968
No. 1245

GUILFORD DINSMUIR SHAW,

Appellant,

vs.

STATE OF CALIFORNIA,
JIM GONZALES PERALTA,

Appellees.

ON APPEAL FROM
THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA,
SECOND APPELLATE DISTRICT, DIV. 5
AFTER DENIAL OF
PETITION FOR HEARING BY THE
SUPREME COURT OF THE STATE
OF CALIFORNIA

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JURISDICTIONAL STATEMENT

Appellant GUILFORD DINSMUIR SHAW appeals from the decision and judgment of the Court of Appeal, Second Appellate District, Division 5 of the State of California entered on

September 16, 1968 which decision affirmed a judgment of conviction, after jury trial, in the Superior Court of the State of California for the County of Los Angeles; appellant, GUILFORD DINSMUIR SHAW submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial Federal questions are presented.

I

Opinion Below

The opinion (Appendix A) of the Court of Appeal of the State of California, Second Appellate District, Division 5 in this case is unreported (the Court of Appeal ordered this opinion not be be published as set forth in said opinion).

II

Jurisdiction

The District Attorney of Los Angeles County originally caused to be filed a "COMPLAINT FELONY" in the Municipal Court of Santa Monica Judicial District, County of Los Angeles, State of California charging appellant, SHAW, and appellee, PERALTA, with violation of Penal Code §288a

of the State of California, in that on March 19, 1965, allegedly, appellant SHAW copulated the penis of appellee PERALTA (Appendix B) [1].

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[1]. The original "COMPLAINT-FELONY" of which appendix B is a copy has been ordered to this Court by the Superior Court of the State of California, for the County of Los Angeles; and said original "COMPLAINT-FELONY" was before the Court of Appeal while it was considering appellant SHAW's cause, Criminal No. 13037 for the Second District, as may be seen from the December 26, 1967 entry in the Register of Actions of the Clerk's Office of the Court of Appeal of the State of California, Second Appellate District; a certified copy of the Register page for the aforementioned Criminal No. 13037 is part of the Certified Record before this Court; furthermore, the "COMPLAINT-FELONY" text is recited at pages 5 and 6 of the Transcript of the Preliminary Hearing dated March 30, 1965; said Preliminary Transcript is properly before this Court for consideration in connection with this appeal since the Court of Appeal took judicial notice in its consideration of appellant SHAW's cause, Criminal No. 13037, as set forth in the entry of April 5, 1967 in the Register Page in said Criminal No. 13037, which Register Page, as aforementioned, is part of the Certified Record before this Court; a certified copy of the aforementioned Preliminary Hearing Transcript, hereinafter designated as "Prelim. Trans.," accompanies the Certified Record to this court. (See Supp. C. R.)

At the Preliminary Hearing appellant SHAW alleged that the aforementioned Penal Code §288a violated due process under the 14th Amendment (Prelim. Trans. 58:11 through 59:2) and that the "COMPLAINT-FELONY" was inadequate process and violative of the 14th Amendment, in that said "COMPLAINT-FELONY" was "on information and belief" with "no underlying facts" set forth in the purported "COMPLAINT-FELONY" (Prelim. Trans. 7:1, et seq.) and thus no basis to hold and/or restrain appellant Shaw before the magistrate in view of the Fourth Amendment.

Subsequent to the Preliminary Hearing the District Attorney of Los Angeles County filed an Information in the Superior Court, State of California, for the County of Los Angeles (C.R., Cl. Tr. p. 1). A timely Demurrer (Appendix C)[2/] to the Information

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[2/] (Appendix C is a copy of the Demurrer to the Information; said Demurrer is properly before this Court in that California Rule of Court 33 provides that the Demurrer is part of the Clerk's Transcript and normal record on Appeal; however, in preparing the Clerk's Transcript for the Court of Appeal, the Clerk of the Superior Court inadvertently left said Demurrer out of the said Clerk's Transcript necessitating that appellant SHAW, make application to "augment the record" so that the Court of Appeal would have before it the aforementioned Demurrer to the Information; said application was granted on December

(C. R. Cl. Tr. p. 1) pursuant to California law, was filed on April 27, 1965 in the Superior Court. (See also Supp. Certified Record in connection with footnote 2, pp. 4 & 5 herein.)

On November 30, 1965 appellant Shaw was sentenced, after conviction by jury trial, by the aforementioned Los Angeles Superior Court to a year in the Los Angeles County Jail suspended on condition that appellant Shaw pay a fine of $300.00, be on probation for two years, and obey certain probationary conditions (C. R. Cl. Tr. p. 77). A timely made motion for new trial and motion for arrest of judgment were denied prior to sentencing (C. R. Cl. Tr. p. 77). A timely notice of appeal (C. R. Cl. Tr. pp. 78-79) was filed in the above-mentioned Superior Court. The appeal was denied by way of the written opinion (Appendix A) cited supra, (See Certified Record, indexed at the beginning of Vol. I, thereof). A timely petition for rehearing (set forth in Vol. II of the certified Record immediately after the opinion by the Court of Appeal) was denied by the Court of Appeal order of October 3, 1968 (See Certified Record, Vol. II, immediately following Petition

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2/ footnote continued from page 4.

18, 1967 with receipt of the original Superior Court file containing the original Demurrer in the Court of Appeal taking place on December 26, 1967 as set out in the certified copy of the register page of the Court of Appeal which page accompanies the certified record; by order of the Superior Court, the original Demurrer is physically present in this Court.

for Rehearing). Petition for Hearing was denied in the California Supreme Court (Certified Record, immediately following the order of the Court of Appeal denying the Petition for Rehearing in said Court of Appeal); the order denying hearing by the Supreme Court of the State of California was entered November 13, 1968 with California Supreme Court Justice Peters of the opinion that the Petition should be granted (Certified Record, Vol. II, last page thereof). A timely notice of appeal to this court was filed on February 11, 1969 in the Court of Appeal (Certified Record, Vol. II, just preceding the certification of the clerk of said Court of Appeal of the State of California). By appropriate orders of this court executed by Associate Justice Douglas, appellant Shaw was allowed until April 10, 1969 to docket an appeal in this court, and Guilford Dinsmuir Shaw was granted until April 10, 1969 to file a Petition for Writ of Certiorari.

The jurisdiction of this court to hear this appeal rests upon 28 U.S.C. 1257 (2).

The jurisdiction of this court to consider a Petition for a Writ of Certiorari in this matter is 28 U.S.C. 1257 (3) and 28 U.S.C. 2103.

This court's jurisdiction is sustained in this appeal by Griswold v. Connecticut, 381 U.S. 479, Robinson v. California, 370 U.S. 660, as to California Penal Code §288 a; as to Penal Code §§806, 807, 808, 813, and 952, the cases sustaining jurisdiction for this Court to

question the power of the magistrate to hold or restrain appellant Shaw for hearing by way of the "Complaint-Felony" (Appendix B) are Giardinello v. United States, 357 U.S. 480, Aguilar v. Texas, 378 U.S. 108, Jaben v. United States, 381 U.S. 214.

III

Statutes Whose Constitutional Validity Are in Question

A

California Penal Code §288a.

"§288a. Perversion; copulation with the mouth; punishment

"Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by

force, violence, duress, menace or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm. (Added Stats. 1921, c. 848, p. 1633, §2, as amended Stats. 1950, 1st Ex. Sess., c. 56, p. 512, §1; Stats. 1952, 1st Ex. Sess., c. 23, p. 380, §3, Stats. 1955, c. 274, p. 729, §1)."

B.

The statutory scheme of Penal Code §§806, 807, 808, 813, 952, as applied to appellant herein, is violative of the due process clause of the Fourteenth Amendment since the "Complaint-Felony" (Appendix "B") is alleged on "information and belief" without underlying facts set forth for said "information and belief" and thus appellant Shaw was held by the court in violation of the Fourth Amendment.

"§806. Proceeding for examination before magistrate; complaint; formalities; contents; construction and effect

"A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate. Such complaint may be verified on information and belief. When the complaint is used as a pleading to which the defendant pleads guilty under Section 859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations and, wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations. (Enacted 1872. As amended Code Am. 1880, c. 47, p. 12, §11; Stats. 1935, c. 217, p. 873, §2; Stats. 1951, c. 1674, p. 3834, § 25.)"

"§ 807. Magistrate defined

"Magistrate defined. A magistrate is an officer having power to issue a warrant for the arrest of a person charged with a public offense. (Enacted 1872.)"

"§808. Persons designated as magistrates

"The following persons are magistrates:

"1. The justices of the Supreme Court;

"2. The justices of the district courts of appeal;

"3. The judges of the superior court;

"4. The judges of the municipal court;

"5. The judges of the justice courts.

(Enacted 1872. As amended Code Am. 1880 c. 28, p. 7, §1; Stats. 1925, c. 445, p. 954, §1; Stats. 1945, c. 43, p. 361, §1; Stats. 1951, c. 1608, p. 3613, §11.)"

"§813. Warrant; issuance

"When a complaint is filed with a magistrate charging a public offense originally triable in the superior court of the county in which he sits, if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant for the arrest of the defendant. (Enacted 1872. As amended Stats. 1951, c. 1674, p. 3834, §27.)"

"§952. Statement of offense

"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. (Enacted 1872. As amended Stats. 1927, c. 612, p. 1043; §1; Stats. 1929, c. 159, p. 303, §1.)"

IV

Questions Presented

The following questions are presented:

A.

Is California Penal Code §288a violative of Federal due process under the Fourteenth

Amendment of the United States Constitution, and hence, void, because the State of California has, through the exercise of its legislative or police power, purported to proscribe conduct which said State of California has no legitimate purpose in doing?

B.

Does California Penal Code §288a, which forbids all oral copulation of genitalia, irrespective of the sex or marital status or presence of mutual consent of the participants, or the degree of privacy under which acts of oral copulation are committed, violate Federal due process under the Fourteenth Amendment of the United States Constitution, and, hence, is void as applied, when said Penal Code §288a is invoked against a male adult defendant, such as appellant herein, for allegedly consensually engaging in an act of oral copulation with another male adult in a public men's restroom, in a toilet stall?

C.

Is it violative of Federal due process under the Fourteenth Amendment of the United States Constitution and violative of the principles of law enunciated in Robinson v. California, 370 U.S. 660, for the State of California to invoke criminal sanctions by way of felony prosecution for purported violation of Penal Code §288a notwithstanding the fact that the oral copulation of the penis of one male by another male is deemed by psychiatrists to be a symptom or manifestation

of mental illness? Does such prosecution constitute the illegal invoking of criminal sanctions against one who is mentally ill, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution?

D.

Is it a violation of due process and/or equal protection under the Fourteenth Amendment of the United States Constitution for the State of California to discriminate in its enforcement of Penal Code §288a such that, overwhelmingly, only men who engage in oral copulation with other men are prosecuted for violation of said Penal Code §288a?

E.

Were Fourth Amendment rights of appellant herein violated by the State of California, necessitating the suppression of the purported evidence of the Police officer who purportedly viewed (for a time which may have been less than one second) the oral copulation of the penis of a co-defendant by appellant wherein, as a matter of police practice in the area where appellant was arrested, the Santa Monica Police Department maintains surveillance facilities of all men who enter the restroom in question, said facilities being available at all times, day or night, to Santa Monica Police Department for said surveillance by Police officers? (There being no waiver by appellant of his Fourth Amendment rights, nor any notice in the area, a public restroom, of the

surveillance). Was the "search and seizure" reasonable?

F.

Was it a violation of appellant's rights to a fair trial under the due process clause of the Fourteenth Amendment of the United States Constitution for the Trial Court in a prosecution alleging the oral copulation of the penis of one defendant by the other defendant (appellant herein), to refuse to allow the attorney for appellant to interrogate the jury as to the prospective jurors' states of mind concerning homosexual conduct between consenting adult males?

G.

Did the Santa Monica Municipal Court document entitled Complaint Felony (No. F 4192) give power to said Court to hold appellant in view of the Fourth Amendment right, by way of the due process clause of the Fourteenth Amendment, that "no warrants shall issue, but upon probable cause, supported by Oath or affirmation," and in view of the fact that said purported complaint is on "information and belief," without any underlying facts set forth showing upon what basis, if any, the purported "information and belief" was predicated?

H.

Does the fact that the statement of the co-defendant was admitted into evidence, over objection of appellant, in the jury trial of the

co-defendant and appellant, (and such admission was denominated an error of "constitutional dimension" by the California Court of Appeal in its written opinion) demand a reversal in the factual situation herein wherein the Police officer testified that his view through the criss-cross maze of a false vent was such that the total time of the alleged oral copulation could have been LESS THAN ONE SECOND? (See Bruton v. U.S., 20 L.Ed. 476 and Chapman v. California, 386 U.S. 18). (See Appendix A, A-6).

I.

Was there a proper foundation laid in connection with the purported giving of constitutional rights to appellant so that appellant's purported statements were properly before the jury?

V.

STATEMENT OF THE CASE

A. Facts Material to Consideration of Questions Presented

Appellant Shaw and appellee Peralta were charged by "Complaint Felony" (see original "Complaint Felony" transmitted to this court by the Superior Court, and see Appendix B which is a copy of a Certified Copy of the original

Complaint Felony) in the Santa Monica Municipal Court with a violation of Penal Code §288a, oral copulation (See III, A, supra). Appellant Shaw and appellee Peralta appeared in said municipal court due to a warrantless arrest (Prelim. Trans. 15:21 et seq.) made by Santa Monica police officers a few instants after the alleged violation at the alleged place of said violation, the purported basis for the arrest allegedly being what had been seen fleetingly (Prelim. Trans. 15:23-26) by one of the two police officers participating in the arrest while said one police officer was peeping through a false vent high in the wall of a men's public restroom in Santa Monica, California. However, the complaint related none of the alleged facts surrounding the arrest, merely alleging the alleged oral copulation, said complaint purportedly being verified on "information and belief" without any allegations appearing regarding the purported source of the purported "information" or the purported reason for the purported "belief" on the part of the purported verifier (Prelim. Trans. 5:6 et seq., Appendix "B") (See the statutory scheme, Penal Code §§806, 807, 808, 813 and 952, set forth, supra in III, B). (See IV, G, supra).

At the preliminary hearing, defense counsel moved unsuccessfully to dismiss on several Federal constitutional grounds, including due process (Appendix "D") and equal protection (Appendix "D"), (Prelim. Trans. 7:1 et seq.; 57:17 et seq.). A timely demurrer to the information (See Penal Code §§950, 951, 952 and 1004 in Appendix D) (the original of said demurrer with its attached exhibits has been

transmitted to this court by the Los Angeles Superior Court; a copy of said demurrer with copies of its exhibits is attached hereto as Appendix "C") was made and overruled; a similar fate befell a motion under Penal Code §995 (C.R. Cl. Tr. p. 3) (See Penal Code § 995 in Appendix D), (See IV, A, B, C, D, E, and G, supra).

Appellant Shaw and appellee Peralta pleaded not guilty and, after a jury trial, each was found guilty (C.R. Cl. Tr. pp. 71 and 72) on July 23, 1965. After a timely motion for new trial (C.R. Cl. Tr. pp. 73 through 77) was denied (C.R. Cl. Tr. p. 77) and motion to arrest judgment was denied (C.R. Cl. Tr. p. 77) appellant Shaw was sentenced with said sentence stayed pending appeal (C.R. Cl. Tr. p. 80); said stay has never been rescinded and is still in effect.

A timely Notice of Appeal (C.R. Cl. Tr. pp. 78 and 79) was filed. In a non-published opinion (Appendix "A") of the Court of Appeal, State of California, Second Appellate District, Division Five, the Superior Court judgment was affirmed. A timely Petition for Rehearing (C.R. Vol. II, located after the opinion of the Court of Appeal) was denied on October 3, 1968 (C.R., Vol. II located immediately following the Petition for Rehearing); a timely Petition for Hearing in the Supreme Court of the State of California (C.R. Vol. II) was denied (C.R., Vol. II last page) with Justice Peters of the California Supreme Court of the opinion that the Petition should be granted. After timely filing of the Notice of Appeal in the Court of

Appeal (C.R., Vol. II) this Court ordered, by way of Associate Justice Douglas, that the Appeal may be docketed on or before April 10, 1969 with the like date allowed for a Petition for Writ of Certiorari.

B. How the Federal Questions Have Been Presented and Raised Below.[3]

At the very earliest opportunity, at the time of the preliminary hearing, to the magistrate conducting the preliminary hearing, a request was made that the complaint (Appendix "B") be read in its entirety into the record (Prelim. Trans. 2:3 et seq.; 5:6 et seq.); the equal protection clause of the Fourteenth Amendment (Appendix D) was raised (Prelim. Trans. 2:16 et seq.) and the Fourth Amendment (Appendix D) requirement that the restraint of a person occur only upon the showing of probable cause was also raised at said Preliminary Hearing (Prelim. Trans. 7:1 et seq.) by invoking the Fourteenth Amendment wherein it was pointed out that the bare allegation on "information and belief" set out in the "Complaint Felony" (Appendix "B") was such that there were no underlying facts alleged to show probable cause for the restraint imposed upon appellant Shaw (forcing him to come to the magistrate's court); the purported complainant could never be prosecuted successfully for perjury. It was alleged also at the preliminary

[3] See also Appendix F - Addendum in re How Federal Questions Were Raised in Courts Below.

hearing that §228a of the Penal Code of the State of California was violative of due process; the court was asked to "take judicial notice of the reports like the Kinsey Report which indicates (sic) that in the community at large as high as 40 percent of the male-female population that are college educated, indulge in oral copulation" (Prelim. Trans. 58:11 et seq.).

There was a request that the court suppress the testimony of the police officer who was allegedly at the vantage point in the men's room based upon the proscription in the United States Constitution against use of evidence invading the right of privacy if such evidence constitutes an improper search and seizure and right of privacy and due process are violated. (Prelim. Trans. 29:26 through 30:26); the request was denied (Prelim. Trans. 31:1 et seq.). The officers had no warrant (Prelim. Trans. 23: 6 et seq.). The equal protection argument invoked, supra, was that only the male-male relationship was prosecuted in Penal Code §288a prosecutions (Prelim. Trans. 2:16 et seq.)

In the Superior Court by way of a timely demurrer (Appendix "C") it was alleged that the Los Angeles Superior Court had no jurisdiction and that the alleged facts did not constitute a public offense (Appendix "C" p. 1); in the Argument connected with the demurrer (said Argument begins in Appendix "C" at p. 2) Robinson v. California, 370 U.S. 660 is invoked at p. 5 of said Appendix "C"; and at p. 6 of Appendix "C" it is urged that due process by

way of the Fourteenth Amendment to the United States Constitution certainly would proscribe the State from barring sexual intercourse between married men and women and that the proscription against oral copulation purportedly invoked by Penal Code §288a purports to forbid that which it cannot do: forbid oral copulation between married men and women. Pierce v. The Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 was set forth for the proposition that upon raising the Federal Constitutional issue of due process in connection with a State statute it must be determined whether or not it is reasonable, and Barnett v. West Virginia State Board of Education, 319 U.S. 624 was set forth for the proposition that if a State statute invades basic rights it violates due process and must be declared invalid (Appendix "C", p. 7).

The declaration of Eric H. Marcus, psychiatrist, on behalf of the Demurrer, and attached to the demurrer, points out that oral copulation between males is the manifestation of sexual perversion which is classified as a mental illness by the American Psychiatric Association; thus, Robinson v. California, supra, which proscribes the punishment of human illness with criminal sanctions was logically invoked; furthermore, the declaration of Eric Marcus (which declaration is uncontroverted in the record before this Honorable Court) sets forth the fact that oral copulation in the male-female marital relationship is normal love play. At page 2 of the declaration of Dr. Marcus is set forth scientific texts maintaining this proposition.

On behalf of the equal protection argument Pace v. Alabama, 106 U.S. 583 (Appendix "C" p. 2) and Hill v. Texas, 316 U.S. 400 (Appendix "C", p. 4) were invoked; furthermore, a study conducted of the Penal Code §288a filings in Los Angeles County Superior Court from January 1, 1963 through June 8, 1964 (see Exhibit "A" attached to Appendix "C" which is part of the record before this court) demonstrates the arbitrary and discriminatory administration of the criminal sanctions of Penal Code §288a against the male-male relationship; of the 470 people prosecuted for violation of Penal Code §288a, only 10 are female; thus, the evidence is conclusive that California Penal Code §288a is administered arbitrarily and discriminatorily against the male-male relationship and in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

After hearing, the demurrer was overruled (C.R., Vol. II, Reporter's Supplemental Transcript for April 27, 1965, 3:7 through 10:11; C.R., Cl.Tr. p. 3).

The Federal Constitutional issues involving the Fourth Amendment rights were raised and presented, prior to trial, pursuant to a motion under Penal Code §995 (C.R., Vol. II, Rep.Supp.Tr. of April 27, 1965, 10:12 through 23:3; C.R., Cl.Tr. p. 3).

The Fourth Amendment (Appendix "D") rights of appellant Shaw were raised and presented at the trial level wherein it was

alleged that the spying which went on in the restroom from the false vent was in violation of the Federal Constitution (C.R., Vol. I of Rep. Tr. 17:20, et seq.) The evidence clearly shows (C.R., Vol. I of Rep. Tr. 24:6, et seq.) that the Santa Monica Police Department could view the interior of the men's room in question at their will, (C.R., Vol. I of Rep. Tr. 28:10, et seq.); defendants' Exhibits A through E, inclusive (C.R., Vol. I of Rep. Tr., p. iii) reflect the interior of the men's room in question and the juxtaposition of pieces of restroom equipment. (These original exhibits, here in this court by way of Los Angeles Superior Court order). The prosecution's own interrogation of the witness Huddleston established that the false vent through which the Santa Monica Police Department did their spying on the men's room was placed there at the suggestion of the Santa Monica Police Department (C.R., Vol. I of Rep. Tr. 32:6, et seq.)

After the witness Huddleston testified concerning the installation of the false vent pursuant to the request by the Santa Monica Police Department, and the use of the false vent by the Santa Monica Police Department, appropriate reliance upon the Fourth Amendment as a basis for the proscription of the use of evidence obtained by use of the false vent was made (C.R., Vol. I of Rep. Tr. 42:18, et seq.)

The Court conceded that the Fourth Amendment (Appendix "D") must be enforced by State Courts (C.R., Vol. I of Rep. Tr. 52:1, et seq.)

VI

The Federal Questions Involved Are Substantial

Enforcement of California Penal Code, §288a violates the due process clause of the Fourteenth Amendment to the United States Constitution (See IV, A, B, and C, supra). The questions presented by this appeal are substantial, inter-alia, because of the widespread practice of oral copulation engaged in by the population of the United States (See Appendix C). It is manifest that any Penal Code provision which proscribes conduct engaged in by such a vast number of people which conduct is sanctioned by the medical profession requires scrutiny to determine whether the criminal sanctions imposed invade areas upon which the State has no legal power or right to intrude. In many ways this scrutiny involves areas and questions analogous to those considered in Griswold v. Connecticut, 381 U.S. 479. In Griswold, at p. 485, this Honorable Court struck down a Connecticut statute which forbade the use of contraceptives, stating that "governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms". . .

It is true that in the instant case, unlike Griswold, those involved as criminal defendants

in the prosecution for violation of California Penal Code, §288a were not husband and wife; indeed, they were both of the male sex; however, a fundamental question to be decided by this court in connection with this appeal is whether "the right to be let alone -- the most comprehensive of rights and the right more valued by civilized men" which right was enunciated by Mr. Justice Brandeis in his dissent in Olmstead v. U.S., 277 U.S. 438 at 478, and which right was given approbation in the concurring opinion of Mr. Justice Goldberg in Griswold, applies here. The allegation that the proscribed oral copulation in the instant case took place in a men's rest room is not of over-riding importance in this case because Penal Code §288a is not limited in application to an alleged public rest room, or any other allegedly public place, but rather Penal Code §288a is violated if the oral copulation takes place in the most discreet and private conditions, even in the marriage bed.

This Court has held in Katz v. United States, 389 U.S. 347 at 351 that the Fourth Amendment "protects people, not places". In this appeal, a substantial question before this Court is whether intimate personal relationships, including the marital relationship of Griswold, will be protected from California Penal Code §288a prosecution which not only can lead to a sentence in the state prison (See text of Penal Code §288a, supra), but, furthermore, upon conviction does cause those convicted, whether they be husband and wife, or otherwise, to register as sex offenders

pursuant to California Penal Code §290 (set forth in Appendix D). (Stayed as to appellant Shaw, C.R., Vol. I, Cl.Tr. 80).

A substantial question for this Court to consider in this appeal is whether the manifestation of mental illness exhibited by oral copulation in the male-male relationship (See Appendix C) is a prosecution proscribed by the philosophy underlying Robinson v. California, 370 U.S. 660 wherein this court forbids state penal sanctions to be invoked due to the presence of evidence of illness in the defendant.

In Griswold v. Connecticut, supra, at p. 485, this Court invoked Mapp v. Ohio, 367 U.S. 643 at 656 as creating a "right to privacy, no less important than any other right, carefully and particularly reserved to the people." The substantial question in the instant case is whether or not this right is one which protects a person using a public rest room when a city police department has instituted "hour by hour" surveillance of the rest room from a vantage point afforded by a false vent high in one of the walls in the rest room. It would appear that appellant Shaw's Fourth Amendment rights have been fortified by protection from the scrutiny engaged in by the Santa Monica police department through the decision of this Court in Katz v. United States, supra. The record reveals that in this case there was no search warrant and there was no warrant of arrest (C.R., Vol. I, Vol. II of Reporter's Transcript, 288:22 through 289:15) when appellant Shaw was arrested in the public rest room in Santa Monica by the Santa Monica police officers

(See original exhibits sent to this court by the Superior Court for the County of Los Angeles, State of California, referred to as People's Exhibit 1 and defendant's exhibits A, B, C, D, and E set forth at p. iii in C.R.; Vol. I, Vol. I of Reporter's Transcript). (See IV, E, supra).

Another facet of the Fourth Amendment problem before this Court for resolution involves whether or not the "hour-after-hour" search by the Santa Monica police department from the vantage point high in the wall in the men's room was "reasonable." In the instant case, contrary to that which occurred in Ker v. California, 374 U.S. 23 at pp. 43 and 44, the "reasonableness of the search" is raised. It is contended by appellant Shaw that the activities of the Santa Monica police department were unreasonable (See IV, E, supra).

Conceding, arguendo, that the "Complaint-Felony" (Appendix B) gave notice to appellant Shaw of the charge against him, there still remains the question as to whether the statutory scheme set forth, supra, under III, B is violative of the Fourth Amendment (See IV, G, supra) in that at the time that appellant Shaw was before the committing magistrate in the Santa Monica Municipal Court the only document before the court, and the document upon which the court purported to hold and restrain appellant Shaw was said "Complaint-Felony" which came into existance after a warrantless arrest (C.R., Vol. I, Vol. II, of Reporter's Transcript, 289:10 through 289:15). In Giardenellov. United States, 357 U.S.

480; Aguilar v. Texas, 378 U.S. 108, and Jaben v. United States, 381 U.S. 214, this Court makes it clear that the "probable cause" to arrest (or search) must be found within the four corners of the complaint. An issue posed by this case is whether in a warrantless arrest situation, a defendant can be held for a preliminary hearing by a "Complaint Felony" which shows no "probable cause." In Aguilar at p. 111 this court points out that the magistrate must perform a "neutral and detached function" and "not serve merely as a rubber stamp for the police." Thus, one issue in the instant case is whether "COMPLAINT-FELONY" (Appendix B) had the legal vitality to hold and restrain appellant Shaw before the magistrate's court since the complaint is on "information and belief" with no underlying facts set forth showing the magistrate upon what the purported complainant based his complaint; and, thus, it may be persuasively argued, there was no "probable cause" for the restraint of appellant Shaw by the Court for the purposes of holding a preliminary hearing. (See IV, G, supra). This is a most significant issue of importance throughout the United States because of the large percentage of criminal defendants who are arrested without warrants and then find themselves before a committing magistrate who has before him a complaint which, although it purports to restrain and hold the defendant for court proceedings, is devoid of the mandatory "probable cause" ingredient required by the Federal Constitution. Furthermore, whether there is an arrest by warrant or not, the ultimate purpose of the complaint

is to restrain or hold the defendant for the Court process.

A further and other substantial question before this Court is whether the prosecution of appellant Shaw is violative of the equal protection clause of the Fourteenth Amendment (See IV, D, supra) in that the records of the Superior Court for the County of Los Angeles, State of California reflect (Appendix C, Exhibit A attached thereto) that the male-male relationship is prosecuted for violation of Penal Code §288a, with heterosexual and female-female oral copulation practically exempt from such prosecution. Hill v. Texas, 316 U.S. 400 proscribes discriminatory state procedure which occurs prior to the actual trial as being in violation of the equal protection laws of the Fourteenth Amendment. See also, Pace v. Alabama, 106 U.S. 583 which proscribes a greater or different punishment for one person than another in the administration of a criminal statute. The pre-trial discrimination here is evident from the demurrer (Appendix C, and Exhibit A, thereto).

The Court of Appeal admits that the admission in the trial court of appellee Peralta's statement, over objection on behalf of appellant Shaw, was an error of "Constitutional dimension" (Appendix A, A-5 to A-6) (See IV, H, supra); but, the Court of Appeal states, that applying Chapman v. California, 386 U.S. 18 the error is such that admitting appellee Peralta's statement adds "nothing of substance" (Appendix A, A-6) in the "light of defendant's admissible statement" (Appendix A, A-6); thus, a substantial Federal

question posed for this Court's resolution is whether the admission of appellee Peralta's statement in fact adds "nothing of substance" or whether, as urged on behalf of appellant Shaw in the Petition for Hearing before the California Supreme Court at pp. 27 to 29, thereof (C.R., Vol. II) and as urged here, did the statement of appellee Peralta provide an illegal corroboration or consistency to the prosecution's case proscribed by Bruton v. U.S., supra; Douglas v. Alabama, 380 U.S. 415, Pointer v. Texas, 380 U.S. 400, and the Sixth Amendment right to confrontation (appellee Peralta did not take the stand; nor did appellant Shaw)? The question is ripe for this Court to resolve.

Referring to IV, F, supra, a substantial Federal question is posed since continual refusal of the trial Court to allow interrogation of prospective jurors concerning their state of mind toward male homosexuality (C.R. Vol. II, Reporter's Supplemental Transcript on Appeal, July 12, 13, 14 and 22, 1965 at 54:23-55:5; 77:24-81:15; 86:19-88:17; C.R. Vol. I, Vol I at p. 4 through 7:24) in a case involving the very inflammatory charge of oral copulation between two men invades the right to an impartial jury trial guaranteed by the Sixth Amendment and the due process clause of the Fourteenth Amendment. Dennis v. U.S., 339 U.S. 162; Morford v. U.S., 339 U.S. 258; Irvin v. Dowd, 366 U.S. 717; Turner v. Louisiana, 379 U.S. 466; Parkes v. Gladden, 385 U.S. 363.

A substantial Federal question revolves around the purported giving of the Constitutional rights by the Santa Monica Police Department officers (See Appendix A, A-3 and A-9, and see IV, I, Supra) and is predicated on whether or not the record reveals a sufficient foundation so that the purported statement of appellant Shaw (and appellee Peralta) were properly admitted (C.R. Vol. I, Vol. 1 of Reporter's Transcript 117:7 through 139:20). The Constitutional rights were allegedly enunciated by the police officers in the men's room instants after the alleged offense took place and instants after the alleged arrests took place. A reason the Federal question is substantial is because there is great doubt that in this setting, or any setting immediately after an arrest, there can be an effective waiver where the purported waiver is predicated on arrestee stating that he "understood" what the police said (C.R. Vol. I, Vol. 1 of Reporter's Transcript 119:9-12). Appellant urges this Court to consider the persuasive argument that merely "understanding" one's rights does not constitute the "waiver" of said rights, the rights set forth in Escobedo v. Illinois, 84 S. Ct. 1758; the case controlling at the time (Miranda v. Arizona, 86 S. Ct. 1602 had not yet been decided on March 19, 1965, the date of arrest), which waiver must exist before post-arrest statements are admissible. Law enforcement agencies as well as those persons in the United States who come under police scrutiny and interrogation look to this Court for guidance in this post-Miranda era as to when "waiver" exists.

VII

Conclusion

The Federal questions raised and presented herein are substantial and of public importance; wherefore, Guilford Dinsmuir Shaw prays that this Court find that it has jurisdiction of this appeal, or, in the alternative, pursuant to 28 U.S.C. 2103, regard the papers pertaining to the appeal as a Petition for a Writ of Certiorari, and grant said Petition.

Respectfully submitted,

IRVING A. KANAREK
14617 Victory Blvd.
Suite 1
Van Nuys, California

Counsel for Appellant.

APPENDIX A

This opinion is not for publication, pursuant to the provisions of Rule 976, California Rules of Court.

[Opinion of the Court of Appeal, Second Appellate District, Division Five, State of California, Filed September 16, 1968, Clay Robbins, Jr., Clerk]

THE PEOPLE,

Plaintiff and Respondent,

v.

GUILFORD DINSMUIR SHAW,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen T. Lynch, Judge. Judgment affirmed.

I. A. Kmarek for Defendant and Appellant.

Thomas C. Lynch, Attorney General, William E. James, Assistant Attorney General, and Stanton J. Price, Deputy Attorney General,

for Plaintiff and Respondent.

This appeal followed a verdict finding the defendant guilty of violating section 288a of the Penal Code and imposition of sentence.[1]

The facts are that one Huddleston, manager of Coffee Dan's restaurant in Santa Monica, contacted the police department of that city and complained about the use of the restaurant's restroom as a meeting place of homosexuals. At the suggestion of the police, Huddleston had the door of the men's restroom commode removed, thus leaving the stall enclosed on three sides only. A false ventilator aperture was placed in the wall of the room. This louvred opening permitted visibility into the restroom from a refrigeration room. The police were given access to this observation facility for the purpose of surveillance of persons frequenting the restroom.

By placement of the peephole, the toilet could be viewed much as it could from other parts of the room. On March 19, 1965, in company with Officer Sullivan, Officer Sutter

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1 Defendant's motion for new trial was denied. Sentence of one year in the Los Angeles County Jail was suspended, and probation granted on enumerated conditions for a period of two years.

of the Santa Monica Police Department was on duty and present at the peephole, observing the activities within his view in the restroom. At about 11:55 p.m., Sutter saw the defendant enter the room and proceed as though to use one of the facilities. Some five minutes later, codefendant Peralta entered and addressed himself to the urinal. Peralta looked over his shoulder in the direction of defendant. Then Peralta turned to face the defendant and performed certain acts which the defendant mimicked while also making other gestures with his tongue. After an interruption and cessation of activity following entry of a third person to the room, a repeat performance occurred, culminating in Peralta's proceeding to the area of the defendant and consummating the criminal act in cooperation with the defendant. The prohibited junction between the two men was observed for some one or two seconds by Sutter before he and Sullivan left their point of vantage, proceeded to the restroom, entered, and arrested both participants.

A statement as to constitutional rights was duly given to defendant and codefendant, and each indicated an understanding thereof.[2] Some 15 minutes later, while at the booking area of the Santa Monica jail, defendant was asked if Peralta had solicited him in the men's room. Defendant

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[2] The trial of this case preceded Miranda v. Arizona (June 13, 1966) 384 U.S. 436 and the guaranties as recited by the officers complied with the requirements of People v. Dorado, 62 Cal. 2d 338.

said: "Well, yes. He was playing with hisself [sic.]" These statements were admitted at trial over objection of defense counsel.

The contentions of defendant on appeal are several. Throughout the whole of the briefs is the theme of incredibility and insufficiency of the prosecution's evidence, but defendant specifically states that he makes no contention of error based upon insufficiency of the evidence. Though we, like the Attorney General, read the arguments as conflicting with defendant's specific denial, we accept his statement.

One contention of defendant is that the prosecution of defendant violated his right to equal protection, in that "the law is enforced only against males engaging in oral copulation with each other." The argument is unsupported by proof that the law is applied in a discriminatory manner. There is no evidence showing intentional or purposeful discrimination. (People v. Gray, 254 Cal. App. 2d ___, ___.*)

Though the defendant makes other contentions as to the unconstitutionality of section 288a of the Penal Code, they are without merit, and a review of cases cited is not warranted. (People v. Roberts, 256 Cal. App. 2d ___, ___.**)

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* 254 A.C.A. 289, 299-302.

** 256 A.C.A. 537, 543-544.

It is contended that the hearsay statement of codefendant Peralta was erroneously admitted. As we have recited, both the defendant and codefendant made extrajudicial statements which were admitted. At the time of admission of each statement, the trial judge instructed that the statement of each was admitted only as against the declarant. The codefendant's statement was properly objected to as one implicating the defendant. The statements of each party related to an accusation or solicitation by the other to commit the criminal act, and hence, not a true admission of the fact itself. The extrajudicial statement by the codefendant, however, implicating the defendant in any way was in violation of the rule expressed in People v. Aranda, 63 Cal. 2d 518, 530-531.[3] This rule is made applicable to the

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3 "When the prosecution proposes to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant, the trial court must adopt one of the following procedures: (1) It can permit a joint trial if all parts of the extrajudicial statements implicating any codefendants can be and are effectively deleted without prejudice to the declarant . . . (2) It can grant a severance of trials if the prosecution insists that it must use the extrajudicial statements and it appears that effective deletions cannot be made. (3) If the prosecution has successfully resisted a motion for severance and thereafter offers an extrajudicial statement implicating a co-defendant, the trial court must exclude it if effective delections are not possible."

instant case by People v. Charles, 66 Cal. 2d 330, 335. In People v. Powell, 67 Cal. 2d 32, 57, it is said: "The Aranda rule operates, of course, even when each statement is properly admissible against the declarant."

Since the opinion in Aranda, the United States Supreme Court considered the issue and declared the error to be one of constitutional dimension. Bruton v. U.S., ___ U.S. ___, 20 L. Ed. 476 at 479 states that the admission of an extrajudicial statement by a codefendant which implicates another defendant is a denial of the right of cross-examination secured by the confrontation clause of the Sixth Amendment. Thus, since the trial of this case and since its briefing on appeal, both the Supreme Court of California and that of the United States have declared that what defendant here objects to is error. It being a "constitutional" error, the rule of Chapman v. California, 386 U.S. 18 is applicable.[4] In light of defendant's admissible statement, the erroneous admission of codefendant's statement added nothing of substance.

As a separate contention of reversible error, and as affecting the magnitude of the Aranda error, defendant contends that an instruction on corpus delicti necessarily was

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4 "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." (p. 24)

required in this case.[5] The record discloses that counsel for defendant stated he would submit to the court the typed instruction which he wished given. He did not do so. Unless the court was under a duty to so instruct sua sponte, there was no error. As the recitation of facts relates, Officer Sutter related having perceived the defendant and codefendant do every element of the crime charged. There was no defense evidence to controvert the facts to which Officer Sutter testified. The defendant's statement in its strongest inference was corroborative at most. The court, at defendant's request, gave the cautionary instruction: "Evidence of the oral admission of defendants ought to be viewed with caution." (People v. Putnam, 20 Cal. 2d 885, 891.) Likewise, the court instructed: "A charge such as that made against the defendants in this case is one which, generally speaking, is easily made, and once made, difficult to disprove. From the nature of a case such as this, the complaining witness

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5

CALJIC 29c Alternate:

"The guilt of a defendant may not be established alone by any confession or admission made by him outside of this trial. Before any person may be convicted of a criminal offense, there must be proof, independent of any such statement, that the crime in question was committed, but it is not necessary that such independent proof include proof as to identity of the person by whom such offense was committed."

and the defendants usually are the only witnesses. Therefore I charge you that the law requires that you examine the testimony of the prosecuting witness with caution." "The fact that the charge here made is one difficult to disprove should not deter you from rendering a verdict of guilty if you are convinced beyond a reasonable doubt that the defendant is guilty as charged."

The corpus delicti was directly established without the statement of defendant and without the codefendant's statement, or both statements considered together, and the cautionary instructions were given. The argument of defendant is devoted to the alleged "weak" and "considerable doubt upon the accuracy or even possibility" of the prosecution's evidence of corpus delicti. While we agree that the court should have given the instruction sua sponte (People v. Frey, 165 Cal. 140), we do not agree that the proof of the corpus delicti was weak. The Attorney General argues that this case is within the type of case governed by People v. Smith, 223 Cal. App. 2d 225 and People v. Williams, 189 Cal. App. 2d 29, where it was held that it was not necessary for the court to instruct on corpus delicti, sua sponte. In neither of the relied upon cases was there an issue as to whether the offense had occurred; the sole issue was whether defendant was connected therewith, i.e., alibi. In the instant case, the offense itself is certainly an issue. We do not find, however, that the error in the court's failing to give the corpus delicti instruction sua sponte requires reversal in the instant case. The lack of such instruction did not magnify the Aranda error. Every element

of the offense was established by the percipient witness, and the question became one of weight and credibility. Defense counsel engaged in a thorough, lengthy cross-examination of the officer, and was unable to shake him in any material respect. The cautionary instructions were sufficient under these circumstances to diminish the error. Beyond a reasonable doubt, the Aranda error and failure to instruct on corpus delicti sua sponte were nonprejudicial and harmless.

The defendant contends that the waiver by defendant of his right to remain silent was not knowledgeably given. Our reading of the present transcript causes us to conclude that a knowledgeable waiver was adequately established to admit the statement. (People v. Furnish, 63 Cal.2d 511; People v. Salcido, 246 Cal.App. 2d 450, 455-456.)

The defendant also contends that the peephole viewing by the officer violated his right to privacy. The issue raised has been adequately answered adversely to his argument by People v. Roberts, supra, at page __*: "It has been consistently held that it is proper to receive testimony of police officers as to their observation of acts of sexual perversion through hidden peepholes looking into a public men's rest room where the acts were committed in the open area of the room and would have been in plain view of anyone entering. [Citations.]"

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* 543 (256 A.C.A. 537).

Defendant contends that questioning of prospective jury members as to their attitudes concerning homosexuality should have been permitted. The issue was whether a Penal Code section 288a violation had occurred, not whether defendant was homosexual, bisexual, or otherwise. The fact that the "nature of the charge" inquiry (People v. Harrison, 13 Cal. App. 555) caused a number of prospective jurors to be voluntarily excused does not enlarge the right of inquiry to fields beyond the scope of involved issues. (People v. Ochoa, 142 Cal. 268; Witkin, Calif. Crim. Proc., pp. 401-2.) The court permitted counsel to ask the prospective jurors whether there was anything in the nature of the charge that would make it difficult, impossible, or unfair for them to sit as jurors.

It is contended that error was committed by the court's alleged interference with and interruption of the final argument of counsel for defendant. We have examined the record and do not agree with defendant's claim of error. The control of the case, including argument, is in the trial court, and unless it can be said that such control is an abuse of discretion, that discretion exercised should not be disturbed on appeal. (People v. Simon, 107 Cal. App. 2d 105; People v. Green, 99 Cal. 564; Witkin, Calif. Crim. Proc., p. 446.)

Another contention of defendant is that it was error to prohibit defense counsel from examining a juror whose illness caused a two day interruption in the trial. Section 1142 of

the Penal Code provides for the interruption of a criminal trial under the circumstances determined by the court to exist in the instant case. While reasonable examination by defense counsel may have been proper, we find no prejudicial error resulted. (People v. Ruef, 14 Cal. App. 576, 607.)[6]

The defendant contends that "The complaint herein was insufficient to justify the issuance of a warrant and, since appellant objected at the earliest opportunity, there was no personal jurisdiction from the start and the defect was not cured by appellant's subsequent appearance and defense." The "complaint" filed in the municipal court was one sworn to solely "upon information and belief," without indication of the nature of such information or the reasonableness thereof.[7] It was

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[6] Overruled on another issue (Cothran v. San Jose Water Works, 58 Cal. 2d 608, 612).

[7] Penal Code section 806:

"A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate; provided, that when such magistrate is a judge of the justice court, the proceeding must be commenced by written complaint under oath subscribed by the complainant, filed

sworn to by Officer Sutter, the arresting officer and direct witness to the acts constituting the crime. No warrant of arrest was issued upon the complaint.

All of the case citations by defendant refer to the sufficiency of a complaint to justify the issuance of a warrant of arrest. The briefs filed were written prior to People v. Sesslin, 68 Cal. 2d __ * and People v. Chimel, 68 Cal. 2d ___. ** These late cases settle the law as to what allegations must be contained in or support a complaint to validate the issuance of a warrant of arrest. The defendant here was not arrested via the warrant route since the acts of the crime charged were perceived by the arresting officer. (Pen. Code. §§836 (1) and 849). The complaint

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7 [Continued]

with the magistrate and concurred in by the district attorney of the county in which he sits or the Attorney General of the State of California. Such complaint may be verified on information and belief. When the complaint is used as a pleading to which the defendant pleads guilty under Section 859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations and, wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations."

* 68 A.C. 431

** 68 A.C. 448

herein involved is in full compliance with Penal Code section 952.[8] It constitutes merely the pleading necessary to give defendant notice of the crime with which he has been charged. (Witkin, Cal. Crim. Proc., §186.)[9] A complaint charging a criminal violation in the language of the statute allegedly violated is sufficient to give notice. (People v. Singer, 217 Cal. App. 2d 743; People v. Lamb, 204 Cal. App. 2d 255.) The probable cause to hold the accused to answer was supplied under oath at the preliminary hearing, and upon this evidence the information was filed and defendant prosecuted. (People v. Atwood, 223 Cal. App. 2d 316, 323.) The

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[8] Penal Code section 952:

"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another."

[9] See Cohen v. Municipal Court, 250 Cal. App. 2d 861 for an analytical review of legislative enactments dealing with pleading in criminal cases.

contention of defendant to the effect that the municipal court had no jurisdiction of the person, lawfully arrested and brought before the magistrate, is without merit.

The judgment is affirmed.

STEPHENS
J.

WE CONCUR:

KAUS
P. J.

AISO
J. pro tempore*

* Assigned by Chairman of the Judicial Council

APPENDIX B

IN THE MUNICIPAL COURT OF SANTA MONICA JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,

v.

GUILFORD DISMUIR SHAW and JIMMY GONZALES PERALTA, Defendants

COMPLAINT
FELONY

M. C. No. .....

Filed 3/22/65
Clerk of the above entitled Court, County of Los Angeles, State of California.

By ..... Deputy Clerk

S. C. No. .....

Personally appeared before me this 22nd day of March, 1965 C. Sutter

of the County of Los Angeles, who being first duly sworn on oath, upon information and belief complains and says:

That on or about the 19th day of March, 1965, at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 288a, Penal Code of California, a felony, was committed by

GUILFORD DUSMUIR SHAW and JIMMY GONZALES PERALTA,

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously participate in the act of copulating the sexual organ, to wit, the penis, of him, the said JIMMY GONZALES PERALTA with the mouth of GUILFORD DUSMUIR SHAW.

Said complainant therefore prays that a warrant may be issued for the arrest of the defendant who may then be dealt with according to law.

C. Sutter

Subscribed and sworn to before me on

March, 22, 1965

Judge of the above entitled Court

EVELLE J. YOUNGER

Issued by [redacted] District Attorney

Bail Recommended

By

GILBERT C. EATON Deputy

$ 1,000.00 + 100 P.A.

WITNESSES

C. Sutter, SMPD

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.

ATTEST MAR 17 1965 19

WILLIAM G. SHARP County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles.

BY Mary Arteldona DEPUTY

(SMPD)

76C253—12-61

D.A. No.....

By.....Clerk

Date of arraignment in the Superior Court will be the April 13, 1965

at 9:00 a.m., in Department B, West District.

It appearing to me that the offense in the within complaint mentioned, to wit, violation of Section 288a of the Penal Code, a felony,

has been committed, and that there is sufficient cause to believe the within named Guilford Dismuir Shaw and Jimmy Gonzales Peralta

guilty thereof, I order that the y be held to answer to the same, and that the y be admitted to bail in the sum of $500 plus $50 P/A, the surety bond heretofore posted for defendant Shaw to remain in effect

and that defendant Jimmy Gonzalez Peralta be committed to the custody of the Sheriff of Los Angeles County until he y shall give such bail.

Dated March 30, 1965.

.....
Judge of the above entitled Court
Committing Magistrate

APPENDIX C

I. A. KANREK
Attorney at Law
14416 Victory Boulevard
Van Nuys, California

873-4255 782-2790 462-5235

Attorney for Defendant
GUILFORD DISMUIR SHAW

FILED
APR 27 1965
WILLIAM G. SHARP, County Clerk
DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GUILFORD DISMUIR SHAW, et al., Defendant.	NO. 303114 DEMURRER TO INFORMATION

COMES NOW GUILFORD DISMUIR SHAW, the defendant above named, and demurs to the Complaint on file herein on the following grounds:

I

That the above-entitled Court has no jurisdiction of the offense charged therein.

II

That the Complaint does not substantially conform to the provisions of Penal Code sections 950, 951, and 952.

III

The alleged facts do not constitute a public offense.

IV

That it contains matter which, if true, would constitute legal justification of the offense charged.

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.
ATTEST MAR 17 1969 19
WILLIAM G. SHARP County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles.
BY Maryann Calabrese DEPUTY

V

That it contains matter which, if true, would constitute an excuse of the offense charged.

VI

That it contains matter which, if true, would constitute a legal bar to the prosecution.

ARGUMENT

A

Scrutiny of the purported information [illegible] with Exhibit "A" attached hereto and the files and records and evidence associated with each of the cases set forth in Exhibit "A" makes it manifestly clear that purported violations of Section 288A are prosecuted in an arbitrary, discriminatory and capricious manner. Such is the only conclusion possible since it is apparent that these prosecutions seek out individuals with a homosexual or purported homosexual characteristics. Since such is the case, the Court has no jurisdiction of the purported offenses charged, the purported facts do not constitute a public offense, and because of the violation of equal protection the matter stated, even if true, constitutes a legal justification or excuse of the offense charged, and the prosecution is barred.

In Pace vs. Alabama, 106 U.S. 583, the United States Supreme Court determined that equality or protection under the law, equal protection guaranteed by the 14th Amendment to the United States Constitution, implies that in the administration of criminal justice no person shall be subject to any greater or different punishment than another in similar circumstances. Penal Code section 288A provides that, inter alia,

> ANY person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the State Prison for not exceeding 15 years, or by imprisonment

in the County Jail not to exceed 1 year;

(Emphasis added).

Exhibit "A" represents the criminal prosectuions in Los Angeles County from January 1, 1963 to June 8, 1964, for alleged violation of Penal Code 288A. The defendants are almost all completely male defendants. In the few cases involving females, the prosecutions involve a striking number of homosexual contacts between females. Thus, the following cases involve only women:

Case No. CR 277438 involving Ona M. Shafer

Case No. CR 278907 involving Barbara Gail DiBiassi and

Case No. 288102 involving Joanna Magar.

It is very evident that, as aforesaid, equal protection of the laws is violated by the way 288A of the Penal Code is administered since oral copulation engaged in by adults of opposite sexes results in very little probability of conviction under 288A of the Penal Code although the statute on its face makes no distinction between heterosexual and homosexual oral copulation. Detailed study of the files enumerated in Exhibit "A" will show this to be an unassailable fact. According to the Kinsey Reports (Alfred C. Kinsey, Wardell B. Pomeroy, and Clyde E. Martin, Sexual Behavior in the Human Male, Philadelphia; W. B. Saunders, 1948, and Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin and Paul H. Gebhard, Sexual Behavior in the Human Female, Philadelphia: W. B. Saunders, 1953.) there is widespread mouth-genital contact. For instance, see Table 94 at page 370 of Sexual Behavior in the Human Male, and at page 371 it is set forth that 43% of the college educated married men group there was mouth stimulation of the male genitalia during the heterosexual relations; and at page 373 it is stated:

"That most of the mouth-genital contacts are had between spouses".

Thus, in the State of California alone, there are countless

hundreds of thousands of married men and women who are guilty of felonious conduct in view of 288A of the Penal Code. Hence the arbitrary and capricious administration of said 288A in violation of equal protection of the laws not only is a violation of the constitutional rights of the defendant, but gives rise to contempt for law and administration of justice. As pointed out at page 244 in Sexual Behavior in American Society, W. W. Norton & Co., Inc., New York, there is little valid reason why law should not use science as a tool.

Medical and other authorities advocate and recommend mouth-genital contact between husband and wife. In Ideal Marriage It's Physiology and Technique by Th. H. Van De Velde, M.D., Random House, New York, 1957, at page 169 he states:

> "And this may best, most appropriately, and most expeditiously be done without the intermediary offices of the fingers, but through what I prefer to term the KISS OF GENITAL STIMULATION, or GENITAL KISS: by gentle and soothing caresses with lips and tongue." (The author has Italicized that which appears capitalized here).

See also SEX IN MARRIAGE by Dorothy Walter Baruch, Ph.D. and Hyman Miller, M.D., Harper & Brothers, Publishers, 1962, at page 70.

In Hill vs. Texas, 316 U.S. 400, the United States Supreme Court has clearly disapproved of discriminatory State procedure wherein discrimination occurs prior to the actual trial. Such discrimination is in violation of the equal protection clause of the Fourteenth Amendment and in fact exists in the instant case.

B

The Demurrer must be sustained because the prosecution is barred by the fact that, in fact, it is a prosecution for

sickness and a violation of due process of law under the Fourteenth Amendment of the United States Constitution and California Constitution, and the prosecution constitutes an infliction of cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution. In the American Handbook of Psychiatry, Basic Books, Inc., Publishers, New York, 1959, at page 589, et seq., it is set forth very clearly that sexual deviation is an illness. At page 607 there is a direct quotation from Sigmund Freud wherein he states:

> "It is a great injustice to persecute homosexuality as a crime, and cruelty too".

The Wolfenden Report, Report of the Committe on Homosexual Offenses and Prostitution, Stein and Day, New York, 1963, contained an introduction by Karl Menninger, M.D., a report made by a select committe to the Secretary of State for the Home Department (England and Wales) and the Secretary of State for Scotland. As a result of this extensive study, the recommendation was made

> "We accordingly recommend that homosexual behavior between consenting adults in private should no longer be a criminal offense".

It is pointed out in the Wolfenden Report at page 47 that homosexual acts between consenting adults in private ceased to be a criminal offense in Sweden in 1944. The Wolfenden Report included medical and social factors in its analyses. It is a very complete report approximately 240 pages in length. Informatio and evidence was obtained from individuals from many walks of life including the clergy, police agencies, and the medical profession.

In Robinson vs. California, 370 U.S. 660, the United States Supreme Court made it very clear that sickness treated by penal measures is a violation of the Eighth and Fourteenth Amendmen

C

Due process under the Fourteenth Amendment to the United States Constitution and under the California Constitution requires that the instant prosecution be barred; that which is proscribed must be within the realm of what, in fact, the State may proscribe. For instance, the State could not pass a statute which forbade sexual intercourse between married men and women; thus, a statute which forbade all sexual intercourse between men and women would be unconstitutional because included within the purview of the statute would be intercourse between married men and women. Similarly, in the proscription in 288A of the Penal Code against ANY person participating in an act of copulating the mouth of one person with the sexual organ of another, there is purported to be a proscription of such activity between married men and women. Thus, that part of the statute proscribing all oral copulation is void on its face in view of the widespread medically approved and recognized practice of oral copulation of genitalia by married men and women in their marital relationships.

Since police power must be exercised under regulations that are reasonable and free of oppression; Ex Parte Sing Lee 96 Cal. 354, 31 P. 245; State Sav. and Com. Bank vs. Anderson 165 Cal. 437, 132 P. 755, the legislature may not use the police power to restrict unduly activities which have social value. Skalko vs. Sunnyvale 14 Cal. 2d 213, 93 P. 2nd 93. Certainly, conjugal happiness between married men and women is such that widespread practices prescribed by medical authorities in the intimate sex life of married men and women must not be stamped as felonious for to do so can create tensions and disrupting influences to marriage as an institution. In re Hall 50 Cal. Ap. 786, 195 P. 975, the court held that although hours of public dance hall operation may be regulated, an ordinance prohibiting dancing after certain hours even in private homes goes too far in invading personal

rights. It is suggested by analogy here that the fact that although copulation of genitalia under certain circumstances may certainly be regulated, the present wording of the statute is so broad that it unconstitutionally invades personal rights. The acid test of the statute is "Is it reasonable?". This is what the courts determine in their scrutiny of a statute to determine whether due process has been violated. Pierce vs. Society of the Sisters of the Holy Names of Jesus and Mary 268 U.S. 510. It is the duty of the judiciary to declare a statute invalid when the effect of the statute is to invade basic rights. Barnette vs. West Virginia State Board of Education 319 U.S. 624.

See Declaration of ERIC H. MARCUS, M.D., Psychiatrist, as medical support for the above theories.

Said Declaration is marked Exhibit "B", a true copy thereof is attached to this Demurrer and the same is hereby incorporated herein by reference as fully as though set forth at this point.

It is requested that the demurrer be sustained.

Respectfully submitted,

T. A. KANAREK
Attorney for Defendant,
GUILFORD DISMUIR SHAW.

PENAL CODE 288A FILINGS IN LOS ANGELES COUNTY SUPERIOR COURT FROM JANUARY 1, 1963, THROUGH JUNE 8, 1964.

EXHIBIT "A"

NAME	LOS ANGELES COUNTY SUPERIOR COURT CRIMINAL NO.	SUPERIOR COURT FILING DATE
CORTEZAN, Robert Abaya	CR 289655	6/1/64
EDDY, Robert Wayne	CR 289649	6/1/64
EVINGER, George Woodrow	CR 289655	6/1/64
BALK, Casey Clement	CR 289543	5/28/64
BANIQUED, John Peter	CR 288739	5/13/64
BARRETT, David William	CR 288470	5/6/64
BELL, Joe W.	CR 288425	5/5/64
BENNETT, Johnnie Alphie	CR 289460	5/26/64
BOURROUS, Robert Parcel	CR 289460	5/26/64
CARAWAY, Charles	CR 288290	5/1/64
CHAMPLIN, JR., William Harry	CR 289044	5/18/64
CHURCH, John A.	CR 289490	5/27/64
CRASHER, Ralph Eugene	CR 288885	5/14/64
DAVIDSON, Charles James	CR 289543	5/28/64
DIAZ, Esteban	CR 289490	5/27/64
EVANS, John Davis	CR 288689	5/12/64
FLETCHER, Gordon Arthur	CR 288722	5/13/64
GRUBBS, Robert Wesley	CR 288885	5/14/64
HARTLEY, Ernest Gledhill	CR 289459	5/26/64
DEAN, Truman James	CR 288649	5/12/64
TOBIN, James Clyde	CR 270560	2/27/63
EVERETT, Richard Paul	CR 288300	5/1/64
HEFNER, Daniel Everett A.	CR 288663	5/12/64
HEFNER, Daniel Alan	CR 288663	5/12/64
HUGHES, Donald William	CR 289045	5/13/64
MILLS, JR., John Thomas	CR 288689	5/12/64
OGLE, Charles George	CR 289163	5/20/64

NAME	CRIMINAL NO.	FILING DATE
OGLE, Charles George	CR 289400	5/26/64
REPLOGLE, Roy	CR 288425	5/5/64
RUSSELL, Donald	CR 288971	5/15/64
SARTWELL, Edward R.	CR 288739	5/13/64
SCHOTT, Emil Stephen	CR 289572	5/29/64
SLAVIN, Robert Samuel	CR 288722	5/13/64
SPICKLE, Dominic	CR 289110	5/19/64
TSCHUMPERT, JR., Roy Fortuna	CR 289064	5/19/64
VINCENT, Jack Thomas	CR 289509	5/28/64
VANNOY, William Virgil	CR 288567	5/18/64
ZARAGOZA, David Rangel	CR 288461	5/6/64
BAKER, Kenneth R.	CR 287825	4/21/64
ARGUIJA, Ray Nieves	CR 287690	4/17/64
BARBELLS, Hector	CR 287472	4/13/64
BRIGGS, Clyde	CR 288154	4/29/64
CONNELLY, Marion	CR 288102	4/28/64
DUDLEY, Garland Edwin	CR 287900	4/22/64
DUKESHIRE, Charles Arthur	CR 288015	4/24/64
FIGARELLI, Joe Michael	CR 287994	4/24/64
FLORES, Charles	CR 287922	4/23/64
FRY, Willis Elroy, JR.	CR 287686	4/17/64
GODINEZ, Antonio	CR 287228	4/7/64
HENDERSON, Dennis Stephen	CR 286050	3/10/64
KALB, Donald Theodore	CR 287846	4/21/64
LAZENBY, Jimmy Lee	CR 287419	4/10/64
LEHMAN, Glenn Thomas	CR 287716	4/20/64
LIST, Frederick	CR 287677	4/17/64
MAGAR, Joanna	CR 288102	4/28/64
MATES, Ronald A.	CR 287825	4/21/64
McCREARY, Charles Michael	CR 287686	4/17/64
METZ, David Lee	CR 287938	4/23/64

NAME	CRIMINAL NO.	FILING DATE
MILLER, Charles	CR 287900	4/22/64
MOORE, Doude Clyde III	CR 287405	4/10/64
NEEDS, Gerald Ray	CR 287794	4/21/64
PEREDO, William	CR 288015	4/24/64
POLLACK, Everette	CR 287764	4/20/64
RIDEAU, Raymond Albert	CR 287829	4/21/64
SATTAZAHN, Richard David	CR 287829	4/21/64
TABANICO, Ray Flores	CR 287716	4/20/64
THOMAS, Donald Arthur	CR 287677	4/17/64
VALENCIA, Miguel Angel	CR 288029	4/27/64
WADE, Woodrow R.E.	CR 288033	4/27/64
WHITLEY, Charles Jeptha	CR 286055	3/1/64
WILLIAMS, Alfred	CR 288072	4/27/64
WILSON, James Edward	CR 287228	4/7/64
ZIGLER, John Elmer	CR 286050	3/10/64
AIRS, James Virgil	CR 283155	1/3/64
BELL, Howard G.	CR 283077	1/2/64
BERNHARD, Irvin Townsend	CR 285963	3/6/64
BLINN, Paul, SR.	CR 286134	3/11/64
BROWNE, Ennis Ray	CR 283598	1/15/64
BUCKLEY, Willie Lee	CR 293253	1/7/64
BUDROW, Donald Lee	CR 284760	2/7/64
BUNETTA, Thomas	CR 283480	1/13/64
BURGUENO, Albert	CR 285412	2/24/64
BURKE, Walter	CR 286348	3/16/64
BUTCHER, Frank Eugene	CR 284890	2/11/64
CAPRETZ, John Floyd	CR 286450	3/18/64
CARRAWAY, Orville Leon	CR 286862	3/30/64
CARY, Richard P.	CR 285838	3/4/64
CONOVER, Richard Warren	CR 286659	3/23/64
DANIEL, Richard Thomas	CR 286412	3/18/64

NAME	CRIMINAL NO.	FILING DATE
DANIEL, Robert Thomas	CR 286412	3/18/64
DAVIS, James S. F.	CR 286659	3/23/64
DOBSON, Richard Charles	CR 286696	3/24/64
DOOKIE, Harold	CR 285006	2/13/64
DUFFY, Daniel Lee	CR 286290	3/13/64
DURAN, Richard R.	CR 284464	1/31/64
DUTSON, Gary Doyle	CR 286127	3/10/64
ECKLES, James Raymond	CR 285268	2/19/64
ESIDORE, Arthur Eamorie	CR 285232	2/19/64
FIELDS, Lyle Pete	CR 285815	3/4/64
FIELS, Martin Glen	CR 283368	1/8/64
FINNEY, David Kenneth	CR 285615	2/27/64
FOTH, Theodore Roland	CR 283524	1/14/64
GOMEZ, Robert Lee	CR 283598	1/15/64
GROMER, Frederick W.	CR 284985	2/13/64
GRUNER, Leroy	CR 285258	2/19/64
HAFFERKAMP, Robert Glenn	CR 286450	3/13/64
HAHN, George Henry	CR 286841	3/26/64
HANSEN, Darryl Joseph	CR 283471	1/13/64
HASKINS, Robert Bolling	CR 285268	2/19/64
HENDERSON, Dennis Steven	CR 286050	3/10/64
HENDRICKSON, Robert Dean	CR 284477	2/3/64
HENSON, Freddie W.	CR 286126	3/10/64
HORTON, Robert Brainard	CR 284361	1/30/64
HOWEY, Gordon Eugene	CR 283524	1/14/64
INGEBRIGHTSEN, John Andrea	CR 283194	1/6/64
JAMES, Richard Die	CR 286290	3/13/64
JENNINGS, Richard Evan	CR 283388	1/9/64
JOHNSON, Alvin B.	CR 286841	3/26/64
JOHNSON, Norman Charles	CR 283559	1/14/64
KARPACK, Kenneth Ludwig	CR 283271	1/7/64

NAME	CRIMINAL NO.	FILING DATE
KELLER, Ernest A.	CR 285412	2/24/64
KLOUS, Mark	CR 285181	2/18/64
KUDLA, John	CR 283567	1/14/64
LACKEY, William Henry	CR 279533	10/3/64
LAFFERTY, Herbert Fraxier	CR 286274	3/13/64
LARGE, Jay Wilford	CR 284241	1/28/64
LAUSTERER, Donald Harvey	CR 283193	1/6/64
LAVAGNI, Marco Antonio	CR 283861	1/21/64
LEE, John	CR 285566	2/26/64
LINGER, Edward Wayne	CR 286079	3/10/64
LONG, Frederick S., JR.	CR 285181	2/18/64
MacDONALD, Donald, JR.	CR 285234	2/19/64
MADISON, Arnold Eugene	CR 285498	2/25/64
MANNOR, Harvey Wendell	CR 285272	2/20/64
MARTINEZ, Trinidad B.	CR 283470	1/13/64
OLSEN, Mars Fairen	CR 285911	3/5/64
OLSEN, Floyd Nels	CR 285911	3/5/64
REED, Richard Leo	CR 285838	3/4/64
REED, Thomas Edwin	CR 285837	3/4/64
REYNA, Gregory	CR 283808	1/20/64
RIESE, Raymond Mac	CR 286694	3/24/64
RINGER, Edward Wayne	CR 286079	3/10/64
SANDFER, Charles Tony	CR 286708	3/24/64
SIBLEY, Jerry Melbin	CR 285615	2/27/64
SIMPSON, William Langdon	CR 283216	1/24/64
SMITH, Henry Valentino	CR 286127	3/10/64
SONGER, Jimmie Dewayne	CR 286979	3/21/64
TANCREDI, Anthony J.	CR 286455	3/18/64
VALLADARES, Orlando Aquilles	CR 286111	3/10/64
VAN VLEET, Victor Gordon	CR 286609	3/20/64
WEINBLATT, Donald Allen	CR 284776	2/7/64

NAME	CRIMINAL NO.	FILING DATE
WELLS, Jay C.	CR 286803	3/26/64
WESTON, Stuart Winfield	CR 285897	3/10/64
WINSTON, Stuart Winfield	CR 286087	3/10/64
YERKES, Frederick Lee	CR 285963	3/6/64
ZIPPER, Eugene Ronald	CR 283644	1/15/64
ALARID, Ernest	CR 277854	8/21/64
ALDERETTE, Gilbert	CR 275396	6/18/63
ALEXANDER, Billy Joe	CR 271285	3/14/63
ALEXANDER, James Robert	CR 276351	7/16/63
ANDERSON, Donald Eugene	CR 267965	1/4/63
ANGELIDES, James	CR 273368	5/1/63
ATENCIO, John Marquis	CR 269207	1/30/63
BACA, Michael A.	CR 268236	1/10/63
BACKEY, William Henry	CR 279533	10/3/63
BAILEY, Willard Warren	CR 281251	11/14/63
BAKER, Albert S., JR.	CR 269936	2/14/63
BAKER, George JR.	CR 277163	8/5/63
BALLARD, Gilbert Thomas	CR 268574	1/17/63
BALLENGER, Bruce Allen	CR 282906	12/26/63
BALUN, James Joseph	CR 272088	4/1/63
BAMMER, Walter Charles	CR 282081	12/5/63
BARSTEAD, Merle A.	CR 273869	5/9/63
BATY, Edward Earl	CR 273658	5/7/63
BAYLIS, Harold George	CR 278938	9/18/63
BEAL, Walter Leo	CR 274189	5/17/63
BELCHER, Raymond Oscar	CR 270949	3/7/63
BENNETT, Guy Vernon	CR 274886	6/6/63
BEVANS, James Owen, JR.	CR 281738	11/27/63
BLACKMON, John Ronald	CR 276758	7/25/63
BLANCHARD, Glen Doyle	CR 271090	3/11/63
BLUFORD, Marvin Lee	CR 268580	1/16/63

NAME	CRIMINAL NO.	FILING DATE
BARBA, Lee THOMAS	CR 275616	6/25/63
BENNETT, George W. JR.	CR 274031	5/14/63
BORRERGO, Alfred Bob	CR 271768	3/25/63
BRASSFIELD, Donald George	CR 279017	9/19/63
BRIDGES, Russell Smith	CR 279594	10/4/63
BROCK, William, JR.	CR 273134	4/25/63
BROWN, Edgar	CR 278909	9/10/63
BROWN, Joseph Edward	CR 274789	6/4/63
BULGER, Richard	CR 270725	3/4/63
BURDINE, Bernard DEE	CR 274245	5/20/63
BURGESS, George	CR 275921	7/2/63
BURNS, James Patrick	CR 276352	7/16/63
BURNS, Joseph Edward	CR 276352	7/16/63
BUTLER, Benard Roy	CR 272544	4/11/63
BUTLER, Robert James	CR 272950	4/22/63
BYRNES, William Joseph	CR 282321	12/11/63
CAHPPLE, Marshall Skip	CR 281115	11/12/63
CANNICI, John Salvatore	CR 276964	7/30/63
CARLSON, Roger Conrad	CR 282051	12/5/63
CATHEY, VANCE LOWELL	CR 274793	6/4/63
CATCIN, Terry	CR 273869	5/9/63
CEPPELLO, Sebastino Mario	CR 276683	7/24/63
CHAPPLE, Floyd Marshall	CR 281115	11/12/63
CHARETTE, Bertrand	CR 275502	6/20/63
CHAVEZ, Ceasar	CR 275502	6/20/63
CLINTON, Alan Brian	CR 277788	8/20/63
COLE, Samuel, Jr.	CR 280175	10/[illegible]/63
COLEMAN, Fred Agustus	CR 280420	[illegible]/63
COLTER, Mamie	CR 278907	[illegible]/63
COLUCCI, Dominic Anthony	CR 267845	2/[illegible]/63
COOK, Wilbur Henry	CR 281418	11/[illegible]/63

NAME	CRIMINAL NO.	FILING DATE
COOMBS, Neil Roger	CR 277617	8/15/63
COPELAND, Billy Leon	CR 273659	5/7/63
CUTE, James Francis	CR 277988	8/26/63
COUTRE, Charles Lee	CR 273134	4/25/63
CROFT, Nalie Clyde	CR 273521	5/3/63
CROLEY, Ronald Eugene	CR 267951	1/4/63
CROWLEY, Burnett Joseph	CR 271416	3/19/63
CUSHMAN, James Edward	CR 274897	6/6/63
DAVIS, Max Ivan	CR 275833	7/1/63
DAVIS, Ray P.	CR 279821	10/10/63
DePEW, Donald Frank	CR 282081	12/5/63
DIBLASI, Barbara Gayle	CR 278907	9/18/63
DOHERTY, Francis Edward	CR 269735	2/8/63
DOLLINGER, Raymond Nelson	CR 272978	4/22/63
DOWNEY, Ronald Richard	CR 280056	3/11/63
DuBUC, Gerard Peter	CR 271091	3/11/63
DuBER, Clyde Nicholas	CR 272817	4/17/63
DuBER, Clyde Nicholas	CR 272838	4/18/63
EHLERS, Walter Frederick	CR 269068	1/29/63
EMERY, Charles Henry	CR 273368	5/1/63
FERGUSON, Don Paul	CR 275693	6/26/63
FERREIRA, Hubert Carroll	CR 272318	4/5/63
FISHER, Percy Lionel	CR 274232	5/20/63
FITZGERALD, Thomas J.	CR 277218	8/6/63
FOSNAUGH, Neil Murphy	CR 272058	4/1/63
FOWLER, Donald Ray	CR 281900	12/2/63
FOX, Robert	CR 274751	6/3/63
FREEMAN, Jim	CR 271171	3/12/63
FREI, Richard Lester	CR 280731	10/31/63
GALBASIN, James Owen	CR 274435	5/23/63
GAMBLE, Lawrence Clark	CR 279017	9/19/63

NAME	CRIMINAL NO.	FILING DATE
GARCIA, Pat	CR 273305	4/30/63
GARNER, Don Ferdnand	CR 276428	7/17/63
CARRETT, Daniel Dee	CR 279070	9/20/63
GARRETT, Daniel Dee	CR 279070	9/20/63
GERMAN, Earl Joseph	CR 270606	2/20/63
CIANNINI, Alex	CR 271590	3/20/63
GIBBS, Everett Wilbur	CR 272544	4/11/63
GOEN, Larry	CR 274707	5/31/63
GONZALES, Raul	CR 270415	2/25/63
GRAHAM, Craig Thomas	CR 281251	11/27/64
GRAHAM, Joseph	CR 275507	6/24/63
GUINN, Willie Harold	CR 271090	3/11/63
GUNN, Johnny Lee	CR 271291	3/14/63
GUNTER, Otis Harmon	CR 278585	9/10/63
HACKFIELD, James Ernest	CR 279620	10/7/63
HALE, Morgan	CR 275760	6/27/63
HALL, James Darwin	CR 276351	7/16/63
HARRINGTON, Richard L.	CR 276146	7/10/63
HAYS, Glenn M., JR.	CR 273520	5/3/63
HEBERT, Jules	CR 279070	9/20/63
HEGEMAN, Lauren Jay	CR 279448	10/1/63
HENSEL, Gerald Dale	CR 274789	6/4/63
HILL, Robert LeRoy	CR 274435	5/23/63
HINDS, David Chapman	CR 269757	2/8/63
HOCMAN, Joseph J., JR.	CR 274962	6/7/63
HOLT, Malcolm Scott	CR 277218	8/6/63
HOYT, William McInnes	CR 282434	12/31/63
HUGHES, Julius McClinton	CR 281029	11/7/63
JIMENEZ, Alexander Gerald	CR 269623	2/7/63
JOHNSON, Robert Forest	CR 271993	3/28/63
JOHNSON, Robert Allen	CR 277827	8/12/63

NAME	CRIMINAL NO.	FILING DATE
JOHNSTON, James Porter	CR 279275	9/26/63
JONES, William	CR 277171	8/5/63
KELTNER, George Laurence	CR 270562	2/27/63
KESTER, Raymond Dennis	CR 269068	1/29/63
KING, Ronald Van	CR 271092	3/11/63
KLEME, Paul Aloysius	CR 275011	7/30/63
KRALL, William	CR 278048	8/27/63
KRUYSEN, Martin Anthony	CR 281029	11/7/63
KUBLER, Ronald Bruce	CR 271590	3/20/63
LaBENSKE, Bill Ronald	CR 260768	7/5/62
LAND, William Vant	CR 273122	4/24/63
LaVIGNE, Raymond Hector	CR 275827	7/1/63
LAVRICH, John Lewis	CR 271291	3/14/63
LEARY, Frank James	CR 271829	3/26/63
LOVE, David Robert	CR 277292	8/7/63
LOWRY, Russell Joseph	CR 279157	9/24/63
MALDONADO, Oscar Janer	CR 274962	6/7/63
MALDONADO, Richard M.	CR 269242	1/31/63
MARQUEZ, David Carlos	CR 275587	6/24/63
MARQUEZ, Efren Saenz	CR 275136	6/11/63
MARTINEAU, Gene	CR 273521	5/3/63
MARTINSON, Jean Reeves	CR 277438	8/12/63
MATOS, Leon Hector Oswaldo	CR 276548	7/16/63
MAY, Thomas Edward	CR 273869	5/9/63
McGONAGLE, Hugh Charles	CR 272411	4/8/63
McINTOSH, James Irvin	CR 278715	12/2/63
MARTINEZ, Orlando	CR 272315	4/5/63
MARTIN, Robert Lee	CR 280502	10/28/63
MANUEL, Earl Lee	CR 278903	9/18/63
MARIN, Manuel Bonilla	CR 270941	3/7/63
LOPEZ, Marcos Hermino	CR 270864	3/6/63

NAME	CRIMINAL NO.	FILING DATE
LINDSEY, James, JR.	CR 268092	1/8/63
LEONARD, Lloyd Orin	CR 282165	12/24/63
LAWRENCE, Leslie Harold	CR 280200	10/21/63
LANGENDORFER, James R.	CR 269972	4/3/63
JORDAN, Lowell Henri	CR 279570	9/30/63
JACKSON, Wilfred	CR 279842	10/10/63
Curtis Larman listed as IRV	CR 269560	2/6/63
INGLE, Herbert Richard	CR 276200	7/12/63
HUMMEL, Richard	CR 278444	9/4/63
HODGES, Ottiway Ashley	CR 268366	1/14/63
HALL, Rudolph Marcus	CR 281904	12/2/63
HADLOCK, James Edward	CR 275077	6/10/63
GORDON, Arnold Bruce	CR 270477	2/26/63
GONZALEZ, Ignacio	CR 275951	7/3/63
GILBERT, Rodney, JR.	CR 273531	5/6/63
GASTON, Paul Ree	CR 269997	2/15/63
GARCIA, Frankie	CR 276608	7/22/63
FERRARA, Angelo C.	CR 274910	6/6/63
FIELDS, Herbert J.	CR 275325	6/17/63
FERENSON, Robert Donald	CR 275904	7/2/63
EVANS, Fred D.	CR 268726	1/22/63
DALLAS, Charles Michael	CR 269701	2/8/63
COTTEY, Malcolm	CR 274753	6/3/63
COTA, Robert Anthony	CR 271585	3/20/63
CONE, Dale James	CR 275888	7/2/63
COLEMAN, James Harold	CR 277288	8/8/63
CHENEY, Frank Dowd	CR 267849	1/3/63
CARTER, Henry Verlin	CR 277675	8/16/63
BURBANK, Joseph Robert	CR 275999	7/5/63
BROWN, Clarence	CR 269997	2/15/63
McINTYRE, Jerry Julius	CR 274245	5/20/63

NAME	CRIMINAL NO.	FILING DATE
McKENNEY, Richard Eugene	CR 271660	3/21/63
McMULLEN, James Edward	CR 270068	2/18/63
McMULLEN, James E.	CR 274188	5/17/63
McNULTY, Walton Murphy	CR 277037	8/21/63
McREYNOLDS, Lawrence I.	CR 275942	7/3/63
MEREDITH, Louis Bernard	CR 281536	11/20/63
MERRITT, Robert Harold	CR 281062	11/8/63
METZ, Joseph I.	CR 280322	10/22/63
MEYER, Robert Joseph	CR 269264	1/21/63
MIDDLETON, George Francis	CR 279393	10/4/63
MILLER, Edward Nauman,	CR 274450	5/24/63
MILLER, James Donald	CR 274637	5/29/63
MILLER, Joe Thomas	CR 279126	9/23/63
MILLS, Robert Earl	CR 269935	2/14/63
MIRANDA, Jose Pacheo	CR 267045	1/2/63
MITCHELL, Harry J.	CR 276091	7/8/63
MITCHELL, Wesley Thomas	CR 276592	7/22/63
MOCK, Gary Bruce	CR 279012	9/19/63
MOCK, Howard Lane	CR 272080	4/1/63
MOLL, William Marwell	CR 276319	7/15/63
MONTANA, David Albert	CR 274623	5/28/63
MONTOYA, Edward Joseph	CR 282164	12/9/63
MOORE, Frank L. John	CR 270372	2/21/63
MOORE, Henry, JR.	CR 283065	12/31/63
MOORE, Robert Lee	CR 274897	6/6/63
MORENO, Hector Louis	CR 281719	11/27/63
MOXLEY, Sherman Edward	CR 279792	10/9/63
MYERS, James William	CR 277263	8/7/63
MYLES, James Richard	CR 274704	5/31/63
NELSON, Vern Allen	CR 276838	7/26/63
NEUNABER, Vernon Lyman	CR 279126	9/23/63

NAME	CRIMINAL NO.	FILING DATE
NINKE, Kenneth Russell	CR 280584	10/29/63
NORMAN, John David	CR 260261	1/10/63
O'BRIEN, Marshall Perry	CR 280714	10/31/63
O'HARE, Ronald Patrick	CR 279430	9/25/63
OLNEY, Cecil Willard	CR 275457	6/19/63
OSWALD, Robert Danny	CR 272543	4/11/63
[illegible]ICK, Manley Archibald	CR 270083	2/18/63
PARK, Frederick R.	CR 270083	2/18/63
PARKS, Joseph Ray	CR 271921	4/19/63
PARKS, Raymond Lee	CR 272883	5/10/63
PARRY, Ronald Leon	CR 276758	7/23/63
PEREZ, Wallace, Jr.	CR 280944	10/27/63
PERRONE, Robert Rocco	CR 276515	7/18/63
PETERS, Maurice Robert	CR 269935	2/14/63
PETRELLO, Thomas Merton	CR 279743	10/9/63
POWELL, Leo Rafael	CR 281000	11/7/63
PRATTE, Richard Gregory	CR 280714	10/31/63
PROVOST, George	CR 279430	10/1/63
QUINLAN, James Thomas	CR 274068	5/15/63
RAMSDELL, Robert Ramon	CR 279545	10/3/63
RAUCH, Emmett Willard	CR 273869	5/9/63
RAYE, Roland L.	CR 282906	12/26/63
REAVES, Andrew Jackson	CR 276121	7/9/63
REDA, Mary Jo	CR 280617	8/29/63
REYNOLDS, James Larry	CR 270667	3/1/63
RICE, Tom Dobbs	CR 273658	5/7/63
RIDDLE, Donald L.	CR 269434	2/4/63
RIDDLE, Elmer	CR 276720	7/25/63
RIFFE, Robert Joseph	CR 269302	2/1/63
RIVERA, Wilford Fernando	CR 289570	2/7/63
NEWMAN, Eugene Boyce	CR 278777	9/13/63

NAMES	CRIMINAL NO.	FILING DATE
ROBBINS, Ivan Howe	CR 276720	7/25/63
ROBERTS, John Earl	CR 275004	6/7/63
ROBERTSON, George Jack	CR 273266	4/19/63
ROCHIN, Frank Ortiz	CR 268969	1/25/63
ROGERS, James Allen	CR 274066	5/23/63
ROGERS, Walter William	CR 271290	4/24/63
ROHMER, Joe Hardin	CR 279161	9/24/63
ROSS, Ralph Furman	CR 270415	2/25/63
RUSSELL, Donald	CR 274657	5/29/63
RUSSELL, Francis LeRoy	CR 274086	6/6/63
RUSSO, Carl Albert	CR 278906	9/18/63
SACKERSON, Robert Edward	CR 269368	2/1/63
SALMON, Gordon Wood, Jr.	CR 275046	6/10/63
SALMON, Fordon Wood	CR 276091	7/8/63
SAMSEL, Robert Jerrald	CR 282099	12/6/63
SAZUE, Robert	CR 272914	4/19/63
SCHOTT, Emil Steven	CR 271664	7/21/63
SCHUMAKER, Leonard Frank	CR 271664	3/21/63
SCULLY, George William	CR 282322	12/11/63
SENESAC, Gerald Sidney	CR 272058	4/1/63
SHAFER, Ona M.	CR 277438	8/12/63
SHEPHERD, Edwina	CR 272838	4/16/63
SHERMAN, Gerald	CR 267903	1/3/63
SHOUP, Herbert George	CR 270949	3/7/63
SHRYOCK, Floyd William	CR 277292	8/7/63
SMEDBERG, William Henry	CR 270649	3/1/63
SMITH, Harvey	CR 275760	6/27/63
SMITH, Hugh Bringham	CR 277221	8/6/63
SMITH, Howard L.	CR 272948	4/22/63
SMITH, Larence Eugene	CR 268804	1/23/63
SMITH, Sharron Louise	CR 270288	2/20/63

NAME	CRIMINAL NO.	FILING DATE
SMITH, Vernon Eugene	CR 268480	1/16/63
SORENSON, Carl Ellis	CR 275271	6/14/63
STACEY, Donald Douglas	CR 275467	6/19/63
STANCEY, Robert Remington	CR 280039	10/16/63
STARR, Richard Claire	CR 279792	10/9/63
STATION, August Lavell	CR 282351	12/11/63
STECHER, Peter	CR 277788	8/20/63
STEVENS, Richard Edward	CR 272411	4/8/63
STEWART, John Richard	CR 268699	1/21/63
STRIPP, Eleanor Mae	CR 277634	8/15/63
STRIPP, John Charles	CR 277634	8/15/63
TARPLEY, Bobby Joe	CR 275827	7/1/63
THOMAS, Robert W.	CR 277163	8/5/63
TINDOL, Joseph Frank	CR 275393 CR 282099	6/26/63 12/6/63
TORTORA, Anthony Emilio	CR 278409	9/4/63
TOUPS, Joseph S.	CR 271829	5/26/63
TUFFREE, Charles Paul	CR 275921	7/2/63
UTESCH, Herbert A.	CR 283066	12/31/63
VANCE, James W.	CR 272661	4/15/63
VASKES, Leo Marcus	CR 277951	1/4/63
VITCO, Donald John	CR 277162	8/5/63
WERNER, Hetta Kohler	CR 278907	9/18/63
WALKER, Peter Cott	CR 271768	3/25/63
WALLACE, James Calvin	CR 269498	2/5/63
WATTS, George Henry	CR 277988	8/26/63
WESTBROOK, Charles Edward	CR 272543	4/11/63
WHITE, James Edward	CR 279743	10/9/63
WILES, Michael Frazier	CR 269236	1/31/63
WILKE, John Bernard	CR 276752	7/25/63
WILL, Raymond Alfonso	CR 270562	2/27/63
WILLIAMS, Charles Robert	CR 280428	10/24/63

NAME	CRIMINAL NO.	FILING DATE
WILLIAMS, John Lucius	CR 269907	2/14/63
WILSON, Ada Nan[illegible]le	CR 278777	9/13/63
WILSON, Bruce M., JR.	CR 280699	1/11/63
WOLF, Sanford Samuel	CR 26993[illegible]	4/3/63
WOODS, Willie Adams	CR 277[illegible]3	4/15/
WRIGHT, Warren Charles	CR 270667	3/[illegible]/63
YATES, John William	CR 277445	8/13/63
YA[illegible]NI, Glenn Arthur	CR 276121	7/9/63
ZARATE, Miguel Angel	CR 272499	4/10/63

EXHIBIT "B"

I. A. KANAREK
14416 Victory Boulevard
Van Nuys, California

Phone: 873-4255 782-2790 462-5235

Attorney for Defendant

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. GUILFORD DISMUIR SHAW, et al., Defendant.	NO. 303114 DECLARATION OF: ERIC H. MARCUS, M.D. PSYCHIATRIST On Behalf of DEMURRER

I, ERIC H. MARCUS, declare as follows:

My educational background includes: Bachelor of Science Degree from the University of California at Los Angeles; a Doctor of Medicine Degree from the University of California at Los Angeles; internship at the Veterans Administration Hospital, Los Angeles; three years residency in psychiatry at the Veterans Administration Hospital in Los Angeles and in the University of California at Los Angeles.

The professional organizations to which I belong are: American Psychiatric Association; American Medical Association; American Society of Criminology; West-Side Medical-Legal Society; Southern California Society for Psychiatry and Law.

I am in private practice of psychiatry and have my offices at 8820 South Sepulveda Boulevard, Los Angeles, California 90045; telephone 670-7169.

I am consultant to the Santa Monica Police Department. I am consultant to Federal Prisons System. A consultant to the California Youth Authority; a consultant to the Los Angeles County Probation Department. I am Chief Psychiatrist of the Westchester Mental Health Center.

A normal sexual relationship is that between two people neither of whom is a child, of opposite sexes; that concludes with the penis in the vagina. It is universally accepted that the oral copulation of the sex organ of the female by the male, and vice-versa, between two people married to each other is part of pre-coital love play.

Scientific literature, which I have read and studied substantiates the fact that the aforementioned oral copulation is normal love play. These texts include the following:

The American Handbook of Psychiatry, Basic Books, Inc., Publishers, New York, New York. 1959.

Studies in the Psychology of Sex, by Havelock Ellis, F. A. Davis Company, Publishers. (These Studies in the Psychology of Sex, encompass many volumes.)

Ideal Marriage, Its Physiology and Technique, by Th. H. van de Velde, M.D. Random House, Publishers, New York. 195[illegible].

Many of the works of Sigmund Freud.

Sexual Behavior in the Human Male, by Alfred C. Kinsey, Wardell B. Pomeroy and Clyde E. Martin; W. B. Saunders Company, Publishers, Philadelphia and London, 1948.

Sexual Behavior in the Human Female, by Alfred C. Kinsey, Wardell B. Pomeroy, Clyde E. Martin, and Paul H. Gebhard; W. B. Saunders Company, Publishers, Philadelphia and London, 1953.

It is well recognized by the medical profession that sexual perversion is an illness. It is listed in the approved classification of Mental Illness, as set forth by the American Psychiatric Association. The oral copulation of the penis of a male by another male is the manifestation of sexual perversion.

I certify (or declare) under penalty of perjury that the

. . . . . .

foregoing is true and correct. Executed in Los Angeles, California, this 26th day of April, 1965.

Eric H. Marcus, M.D.

ERIC H. MARCUS, M. D.

STATE OF CALIFORNIA, County of Los Angeles

No303114

I, WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court for the county and state aforesaid, do hereby certify the foregoing to be a correct copy of the original

Complaint 2 pages, Demurrer to Information, Penal Code 288a Filings in Los Angeles County Superior Court from January 1, 1963, through June 8, 1964 16 pages, Declaration of Eric H Marcus, M. D. Psychiatrist 3 pages in the case of the People vs. GUILFORD DISMUIR SHAW

on file and of record in my office, and that I have carefully compared the same with the original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the Superior Court.

Dated: **March 17, 1969**

WILLIAM G. SHARP, County Clerk and Clerk of the Superior Court of the State of California for the County of Los Angeles

By Mary Ann Caledonia, Deputy

76C135M—Cdb 7-66

APPENDIX D

Constitutional Provisions, Rules of Court, and Statutes Applicable in this Case (Other than Statutes Directly involved in Questions of Constitutional validity; see III, supra).

Due Process Clause of Fourteenth Amendment.

"Nor shall any State deprive any person of life, liberty, or property without due process of law;"

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Equal Protection Clause of Fourteenth Amendment - "Nor deny to any person within its jurisdiction the equal protection of the laws".

Rule 33 of California Rules of Court.

"Rule 33. Contents of Record on Appeal from Judgment or Order on Motion for New Trial.

"(a) [Normal record] If the appeal is taken by the defendant from a judgment of

conviction or from an order denying a motion for a new trial, or if the appeal is taken by the People from an order granting a motion for a new trial, the record on appeal, except as hereinafter stated, shall include the following (which shall constitute the normal record):

"(1) A clerk's transcript, containing copies of (a) the notice of appeal, any certificate of probable cause executed and filed by the court, and any request for additional record and any order made pursuant thereto; (b) the indictment, information or accusation; (c) any demurrer; (d) any motion for a new trial; (e) all minutes of the court relating to the action; (f) the verdict; (g) the judgment or order appealed from; (h) written instructions given or refused indicating on each instruction theparty requesting it; and

"(2) A reporter's transcript of the oral proceedings taken on the trial of the cause, including jury instructions given which cannot be copied by the clerk, and on the hearing of the motion for a new trial, excluding therefrom proceedings on the voir dire examination of jurors, opening statements, and arguments to the jury. [As amended eff. Jan. 1, 1968]

"(b) [Request for Additional Record] The appellant may request the inclusion in the record of any of the following:

"(1) In the clerk's transcript: (a) written motions made or notices of motion given by the defendant or by the People and affidavits filed in support of or in opposition to the motion for new

trial or any other motion; (b) any written opinion of the superior court.

"(2) In the reporter's transcript: (a) proceedings on the voir dire examination of jurors; (b) opening statements; (c) arguments to the jury; (d) any oral opinion of the superior court, and comments on the evidence by the trial judge before the jury.

"(3) To be transmitted as originals: any exhibits admitted in evidence or rejected.

"If the appellant desires such additional record he shall file with his notice of appeal an application describing the material which he desires to have included and the points on which he intends to rely which make it proper to include it. The clerk shall immediately present the request to the judge and notify the reporter. The judge, within five days after the filing of such application, shall make an order directing the inclusion in the record of as much of the additional material as, in his opinion, may be proper to present fairly and fully the points relied on by appellant in his application. If the judge fails to make any order within five days after the application is filed, the material requested, with the exception of exhibits, shall be included in the clerk's and reporter's transcripts without such order, [As amended effective Jan. 1, 1959.]"

California Penal Code Section 290

"§290. Registration of sex offenders

Duty to register; time.

"Any person who, since the first day of July, 1944, has been or is hereafter convicted in the State of California of the offense of assault with intent to commit rape or the infamous crime against nature, under Section 220, or of any offense defined in Sections 266, 267, 268, 285, 286, 288, 288a, subdivision 1 of Section 647a, subdivision 3 or 4 of Section 261, subdivision (a) or (d) of Section 647, or subdivision 1 or 2 of Section 314 of this code, or of any offense involving lewd and lascivious conduct under Section 272 of the Penal Code; or any person who since said date has been or is hereafter convicted of the attempt to commit any of the above-mentioned offenses; or any person who since said date or at any time hereafter is discharged or paroled from a penal institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses; or any person who since said date or at any time hereafter is determined to be a sexual psychopath under the provisions of Chapter 4 of Part 1 of Division 6 of the Welfare and Institutions Code; or any person who has been since said date or is hereafter convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses shall within 30 days after the effective date of this section or within 30 days of his coming into any county or

city, or city and county in which he resides or is temporarily domiciled for such length of time register with the chief of police of the city in which he resides or the sheriff of the county if he resides in an unincorporated area.

"Notice of duty to register; prisoner or inmate.

"Any person who, after the first day of August, 1950, is discharged or paroled from a jail, prison, school, road camp, or other institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses or is released from a state hospital to which he was committed as a sexual psychopath under the provisions of Chapter 4 of Part 1 of Division 6 of the Welfare and Institutions Code shall, prior to such discharge, parole, or release, be informed of his duty to register under this section by the official in charge of the place of confinement or hospital and the official shall require the person to read and sign such form as may be required by the State Bureau of Criminal Identification and Investigation, stating that the duty of the person to register under this section has been explained to him. The official in charge of the place of confinement or hospital shall obtain the address where the person expects to reside upon his discharge, parole, or release and shall report such address to the State Bureau of Criminal Identification and Investigation. The official in charge of the place of confinement or hospital shall give one copy of the form to the person, and shall send two copies to the State Bureau of Criminal Identification and Investigation, which bureau, in turn,

shall forward one copy of the appropriate law enforcement agency having local jurisdiction where the person expects to reside upon his discharge, parole, or release.

"Notice of duty to register; probationer or one paying fine.

"Any person who after the first day of August, 1950, is convicted in the State of California of the commission or attempt to commit any of the above-mentioned offenses and who is released on probation or discharged upon payment of a fine shall, prior to such release or discharge, be informed of his duty to register under this section by the court in which he has been convicted and the court shall require the person to read and sign such form as may be required by the State Bureau of Criminal Identification and Investigation, stating that the duty of the person to register under this section has been explained to him. The court shall obtain the address where the person expects to reside upon his release or discharge and shall report within three days such address to the State Bureau of Criminal Identification and Investigation. The court shall give one copy of the form to the person, and shall send two copies of the State Bureau of Criminal Identification and Investigation, which bureau, in turn, shall forward one copy to the appropriate law enforcement agency having local jurisdiction where the person expects to reside upon his discharge, parole, or release.

"Contents of registration.

"Such registration shall consist of (a) a statement in writing signed by such person, giving such information as may be required by the State Bureau of Criminal Identification and Investigation, and (b) the fingerprints and photograph of such person. Within three days thereafter the registering law enforcement agency shall forward such statement, fingerprints and photograph to the State Bureau of Criminal Identification and Investigation.

"Change of address.

"If any person required to register hereunder changes his residence address he shall inform, in writing within 10 days, the law enforcement agency with whom he last registered of his new address. The law enforcement agency shall, within three days after receipt of such information, forward it to the State Bureau of Criminal Identification and Investigation. The State Bureau of Criminal Identification and Investigation shall forward appropriate registration data to the law enforcement agency having local jurisdiction of the new place of residence.

"Violation; offense.

"Any person required to register under the provisions of this section who shall violate any of the provisions thereof is guilty of a misdemeanor.

"Confidential records.

"The statements, photographs and fingerprints herein required shall not be open to inspection by the public or by any person other than a regularly employed peace or other law enforcement officer.
(As amended Stats. 1961, c. 560, p. 1672, §3; Stats. 1961, c. 2147, p. 4430, §8; Stats. 1967, c. 716, p. ___, §1.) "

California Penal Code Section 950.

"§950. Accusatory pleading; title of action; statement of offense

"The accusatory pleading must contain:

"1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;

"2. A statement of the public offense or offenses charged therein. (Enacted 1872. As amended Code Am. 1880, c. 47, p. 12, §15; Stats. 1951, c. 1674, p. 3836, §43.)"

California Penal Code Section 951.

"§951. Indictment or information; form

"An indictment or information may be in substantially the following form: The people of the State of California against A. B. In the superior court of the State of California, in and for the county of _____. The grand jury (or the

district attorney) of the county of ____ hereby accuses A. B. of a felony (or misdemeanor), to wit: (giving the name of the crime, as murder, burglary, etc.), in that on or about the ___ day of ___, 19__, in the county of ____, State of California, he (here insert statement of act or omission, as example, "murdered C. D."). (Enacted 1872. As amended Code Am. 1880, c. 47, p. 12; §16, Stats. 1927, c. 613, p. 1043, §1.)"

California Penal Code Section 952.

"Cross References

"Demurrer to accusatory pleading, nonconformity with this section, see §1004.

"§952. Statement of offense

"In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another. (Enacted 1872. As amended Stats. 1927, c. 612, p. 1043; §1; Stats. 1929, c. 159,

p. 303, §1.)"

California Penal Code Section 995.

"§995. Cases in which indictment or information must be set aside

"The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

"If it be an indictment:

"1. Where it is not found, endorsed, and presented as prescribed in this code.

"2. That the defendant has been indicted without reasonable or probable cause.

"If it be an information:

"1. That before the filing thereof the defendant had not been legally committed by a magistrate.

"2. That the defendant had been committed without reasonable or probable cause. (Enacted 1872, As amended Code Am. 1880, c. 118, p. 43, §1; Stats. 1911, c. 256, p. 435, §1; Stats. 1927, c. 854, p. 1756, §1; Stats. 1939, c. 457, p. 1806, §1; Stats. 1949, c. 1311, p. 2298, §1.)"

California Penal Code Section 1004

"§1004. Demurrer; grounds

"The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

"1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

"2. That it does not substantially conform to the provisions of §§950 and 952, and also Section 951 in case of an indictment or information;

"3. That more than one offense is charged, except as provided in Section 954;

"4. That the facts stated do not constitute a public offense;

"5. That it contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to the prosecution. (Enacted 1872. As amended Coe Am. 1880, c. 47, p. 18, §46; Stats. 1905, c. 574, p. 772, §3; Stats. 1951, c. 1674, p. 3841, §73.)"

California Penal Code Section 1185.

"§1185. Motion; definition; defects authorizing motion; time; entry of order

"A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant, on a plea of a former conviction, former acquittal or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must be immediately entered in the minutes. (Enacted 1872. As amended Code Am. 1880, c. 47, p. 25, §87; Stats. 1905, c. 536, p. 697, §1; Stats. 1909, c. 712, p. 1087, §1; Stats. 1951, c. 1674, p. 3851, §118.)"

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

JUDGMENT

November 30, 1965 Present Hon. ALLEN T LYNCH Judge

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff,
vs.
GUILFORD DINSMUIR SHAW Defendant,

Department No. WEST C

303114

Deputy District Attorney Ronald Mirkin and the Defendant with counsel, I A Kanarek, present. Defendant's motion for new trial based on all statutory grounds is argued and denied. Defendant's motion for arrest of judgment is denied. Sentenced as indicated, suspended. Probation granted for two years.

- ☐ Spend first ____ in County Jail. ☐ Road Camp or Honor Farm Recommended. Good time allowed if earned.
- ☒ Pay fine of $ 300. through Probation Officer in such manner as such officer shall prescribe plus 330. penalty assessment
- ☐ Make restitution through Probation Officer in such amounts and manner as such officer shall prescribe.
- ☐ Pay any judgment arising out of this matter when it becomes final in such amounts and manner as Probation Officer shall prescribe.
- ☐ Abstain from all alcoholic beverages and stay out of places where they are the chief item of sale.
- ☐ Not use or possess any narcotics or narcotic paraphernalia and stay away from places where addicts congregate.
- ☐ Not associate with known narcotic users or sellers.
- ☐ Have no blank checks in possession, not write any portion of any checks, not have bank account upon which may draw checks.
- ☐ Not gamble or engage in any bookmaking activities or have paraphernalia thereof in possession, and not be present in places where gambling or bookmaking is conducted.
- ☐ Not associate with ____
- ☐ Stay out of places where homosexuals congregate.
- ☐ Not associate with children under 14 years except in presence of responsible adults.
- ☐ Cooperate with Probation Officer in plan for psychiatric, psychological or other treatment.
- ☐ Seek and maintain employment as approved by Probation Officer.
- ☐ Support dependents.
- ☒ Maintain residence as approved by Probation Officer.
- ☐ Surrender drivers license to Clerk of Court to be returned to Department of Motor Vehicles, and not drive a motor vehicle for the first year after release from custody nor until lawfully licensed.
- ☒ Obey all laws, orders, rules and regulations of Probation Department and of the Court.

Ten day stay of execution granted.

Whereas the said defendant having been duly found guilty in this court of the crime of VIOLATION OF SECTION 28da, Penal Code, a felony, as charged in the information

It is Therefore Ordered, Adjudged and Decreed that the said defendant be punished by imprisonment in the County Jail of the County of Los Angeles for the term of one year.

[illegible] Bail exonerated.

APPENDIX F

Addendum in re
How Federal Questions Were Raised and Presented in Courts Below.

The Superior Court (trial court) rejected an offer of proof that the Santa Monica police officers on "many, many occasions" (C.R., Vol. I, Vol, I of Reporter's Transcript, 75:8 through 77:10) used the false vent between the restroom and a store room for the purpose of viewing the happenings inside said restroom. Mapp v. Ohio, 367 U.S. 643, was urged as a Federal Constitutional basis for a motion to suppress the evidence or purported evidence resulting from the Santa Monica police officer looking through the vantage point. (C.R. Vol. I, Vol. I Reporter's Trans. 76:2 through 77:12; 84:10 through 86:9). The motion was denied (C.R. Vol. I, Vol. I Reporter's Transcript 90:3-4).

Interrogation concerning the purported giving of constitutional rights raised Federal issues. (C.R., Vol. I, Vol. I of Reporter's Transcript, 117:7 et seq.).

The trial court condeded that it was a very close question as to whether or not the viewing done by the law enforcement officers was such an invasion of privacy as to preclude the use of testimony which described what was purportedly seen by the viewing. (C.R., Vol. I, Vol. II of Reporter's Transcript, 436:4 through 6).

Motion to Arrest Judgment was made prior to sentencing, but after the jury brought in its verdict of guilty. (C.R., Vol. I, Vol. II of Reporter's Transcript, 469:7 et seq.) The Motion to Arrest Judgment, which was denied (Appendix D, Penal Code §1185), raised Federal Constitutional issues since in connection with the motion it was pointed out that the demurrer (Appendix C) was filed and an attempt was made to incorporate the demurrer in the motion and matters in the demurrer in the motion.

Federal issues were appropriately raised in Appellant's Opening Brief, Reply Brief, and Petition for Rehearing before the Court of Appeal. Thus, at §4, beginning at p. 38 of Appellant's Opening Brief before the Court of Appeal, Appellant Shaw invoked the Fourth and Fourteenth Amendments to the United States Constitution, and alleged that the "COMPLAINT-FELONY" (Appendix B) and its utilization in holding Appellant Shaw before the magistrate's court violated the Fourteenth Amendment to the United States Constitution, (C.R., Vol. II, Appellant's Opening Brief, p. 2 et seq.); of course, the Fourth Amendment issues were also explored in Appellant's Opening Brief (C.R., Vol. II, Appellant's Opening Brief, p. 38, et seq.)

The due process issue was explored in Appellant's Opening Brief showing that Penal Code §288a is void as an enactment in abuse of the legislative police power and in violation of the guarantees of substantive due process (C.R.

Vol. II, Appellant's Opening Brief, p. 68, et seq.); it was alleged that due process was violated in the utilization of the "COMPLAINT-FELONY" (Appendix B) to hold and restrain appellant Shaw before the magistrate's court (C.R., Vol. II, Appellant's Opening Brief, p. 55, et seq.); it was alleged that appellant Shaw's right to equal protection of the laws was violated by his prosecution under Penal Code, §288a. (C.R., Vol. II, Appellant's Opening Brief, p. 61, et seq.), and it was alleged appellant Shaw's rights under the Fourth Amendment were violated by the viewing of the men's room by the Santa Monica police department (C.R., Vol. II, Appellant's Opening Brief, p. 38, et seq.).

After the People of the State of California filed their Respondent's Brief (C.R. Vol. II) appellant Shaw filed his "Appellant's Reply Brief" before the Court of Appeal (C.R., Vol. II) in which he once again raised and presented Federal Constitutional issues concerning the violation of substantive due process by Penal Code §288a prosecution (C.R., Vol. II, Appellant's Reply Brief, p. 23, et seq.); the "COMPLAINT-FELONY" (Appendix B) it was alleged, was used to restrain and hold appellant Shaw before the magistrate's court in violation of due process (C.R., Vol. II, Appellant's Reply Brief, p. 20, et seq.); it was alleged the Fourth Amendment rights of appellant Shaw were violated by the viewing of the men's room through the false vent (C.R., Vol. II, Appellant's Reply Brief, p. 11, et seq.); and it was alleged that appellant Shaw's right to equal protection of the laws was violated

by the Penal Code §288a prosecution (C.R., Vol. II, Appellant's Reply Brief, p. 22, et seq.); the opinion of the Court of Appeal (C.R., Vol. II), at page A-4 summarily states that the contentions concerning the unconstitutionality of Penal Code §288a are without merit; similarly, at page A-11, et seq. of the opinion of the Court of Appeal (C.R., Vol. II), the court speaks of the fact that the defendant was not arrested by way of a warrant (Appendix A, A-12) which does not meet the issue raised by appellant Shaw; nor does the fact that the "COMPLAINT-FELONY" (Appendix B) which purportedly gives notice of the offense charged, meet the issue raised by appellant Shaw in connection with said "COMPLAINT-FELONY"; the issue is whether or not such process, utterly lacking in informing the magistrate of any probable cause to hold or restrain appellant Shaw before the magistrate's court, can be used as a basis to so hold and restrain him: bare notice of the charge made is obviously not the same as the probable cause necessary to have the power to restrain; in a similar manner, also, the opinion of the Court of Appeal purports to dispose of the equal protection issue (Appendix A, p. A-4 stating, in so doing, that the argument of equal protection is unsupported by proof that the law is applied in a discriminatory manner which completely overlooks Exhibit A attached to "Demurrer to the Information" (Appendix C).

Although the Court of Appeal concedes that the admission of the hearsay statement of appellee Peralta, was an error of "constitutional dimension," citing Bruton v. United States, 20 L.Ed.,

476 at 479, the Court of Appeal goes on to find that under Chapman v. California, 386 U.S. 18, the erroneous admission of appellee Peralta's statement added "nothing of substance" (Appendix A, A-6). This position was refuted in the Petition for Hearing before the California Supreme Court (C.R., Vol. II, page 27, et seq.); the issues of due process, lack of probable cause for holding and restraining appellant Shaw before the magistrate's court, the invasion of the Fourth Amendment rights of appellant Shaw by the viewing in the rest room, and the violation of appellant Shaw's right to equal protection of the laws were respectively raised in the Petition for Hearing before the California Supreme Court, (C.R., Vol. II at p. 23, p. 11 et seq., p. 20, and p. 21, respectively); the Petition for Hearing was denied without opinion with California Supreme Court Justice Peters of the opinion a hearing should be granted (C.R., Vol. II, last page).

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

SHAW *v.* CALIFORNIA.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1245. Decided May 26, 1969.

PER CURIAM.

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.